Lakhan Rai v. *Bandan Rai*(1), *Bishenmun Singh* v. *The Land Mortgage Bank of India*(2), *Umedmal Motiram v. Davu Bin Dhondiba*(3), and also on section 54 of the Transfer of Property Act.

The present case is, however, distinguishable from the above. Here the first purchaser abstained from paying the purchase money from 1887 to 1890, and allowed his vendor to retain possession, and then to sell the property to defendants 3 and 5, who, in consequence, paid off the mortgage that was to be discharged by the original purchaser.

The plaintiff purchased the same property from the first defendant in 1888, and lay by till 1890, and then, forging the lease B, brought this suit for possession of the property without offering to pay the consideration or accounting for it.

We are unable to say that his conduct discloses an intention to insist upon the original sale as a valid transaction.

After thus lying by for several years, we do not think he should be permitted in equity to turn round on others who have paid valuable consideration and succeed with the aid of a forged document. To do so would be to permit the Registration Act to be turned into an instrument of fraud.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

VOLKART BROTHERS (PLAINTIFFS),

v.

RUTNAVELU CHETTI (DEFENDANT).*

1892. October 21. 1894. February 6.

Contract Act—Act IX of 1872, *s.* 39—*Shipment at monthly intervals.*

The defendant agreed to purchase from the plaintiffs 120 cases of condensed milk which were to be shipped in London and delivered in Madras. The agreement stipulated for shipment in six lots of twenty cases each at monthly intervals, but it contained a proviso, whereby the plaintiffs were excused from monthly shipments if space in ships sailing for Madras were not available. The second shipment was

(1) I.L.R., 2 All., 711. (2) I.L.R., 11 Calc., 244. (3) I.L.R., 2 Bom., 547.

* Referred Case No. 12 of 1892.

VOLKART BROTHERS v. RUTNAVELU CHETTI.

not made within one month from the date of the first shipment, thereupon the defendant repudiated the contract:

Held, (1) that the interval of time contemplated in the contract was one month more or less, regard being had to the time which it might be reasonable to allow to the plaintiffs for finding a steamer available for the required shipment;

(2) that the plaintiffs having failed to make the second shipment by a steamer of which they might have availed themselves, the defendant was justified in rescinding the contract.

CASE stated by P. D. Shaw, Chief Judge of the Court of Small Causes, Madras, under Act XV of 1882, s. 69.

The case was stated as follows:—

"Suit for recovery of Rs. 583-9-1 the loss sustained by reason of the failure of defendant to pay for, and take delivery of, one hundred cases condensed Swiss milk ordered by the defendant from plaintiffs at Madras on 14th May 1890, and which were re-sold on defendant's account on or about 5th and 9th February 1891.

The order or contract on which plaintiffs sue is exhibit A, and was for one hundred and twenty cases each four dozens—1 lb. round tins condensed milk, Milk Maid brand, at 15 per case, packing as usual with iron hoops.

'Shipment in six lots of twenty cases each at monthly intervals. First shipment within 3-4 weeks from receipt of telegram or sooner if possible. Stock Mark $\frac{\text{Cts.}}{\text{C \& R.}}$'

Defendant admitted the contract, but pleaded that as to one hundred cases it was rescinded by him on 18th August 1890, that the milk imported by plaintiffs was not according to contract, and that even if liable for the milk he was not chargeable with the godown rent, interest and charges claimed.

It is well to state at once that defendant offered no evidence of the quality of the milk and practically abandoned this plea. The defendant's case is that the milk was not shipped in due course according to the terms of the contract and that, in consequence he rescinded on 18th August 1890 the portion of the contract which remained to be carried out.

The contention for plaintiffs is that the expression in exhibit A 'shipment in six lots of twenty cases each at monthly intervals' means shipment month by month, that is to say, if as in this case the first shipment was made in June and others in the following consecutive five months the condition has been fulfilled, and I find, as a fact, that, with the exception of the month of

September in which two shipments were made, the other shipments were so made.

The defendant's contention is that the expression 'monthly intervals' means that the shipments should be made at intervals of a month from each other. In exhibit A there is also a proviso, by which the plaintiffs are excused from the monthly shipments if space in ships sailing for Madras was not available, but upon this point no evidence was adduced by either side though on the plaintiffs' side it was shown that a ship left London on the 19th July and arrived here on the 21st August.

As to the improbability of this contention of plaintiffs being the correct one, we have only to see what happened as to the second shipment: it was made over five weeks from the first shipment, viz., on 27th July the first shipment having been on 18th June, and the defendant did not get notice of the arrival here of the second shipment till 6th September, thus leaving defendant during the whole month of August without any shipment. The evidence of Thomas, Binny and Co.'s shipping clerk, shows that the *Golconda* by which the second shipment arrived, arrived here on 30th August. If plaintiffs' contention is to be held good then it would be necessary to hold that a shipment at any time in the month subsequent to a previous shipment would fulfil the condition, and that although the agreement was for shipments at monthly *intervals* the interval to be allowed between them was not to be considered in carrying out the contract.

The defendant's contention seems to be more reasonable, for the importer in giving his order would naturally arrange that he should get his supplies at fixed periods and would not leave the dates of arrival uncertain, and the ordinary mode of doing this would seem to be by fixing the date of departure from the export country. Further there is the evidence of the defendant's agent corroborated to a certain extent by exhibits D, E, F and No. 3 that this was the way the contract was understood by both parties originally. The defendant's agent says he received notice of the arrival of the first shipment in July 'and went to plaintiff's office and saw Mr. Schultzer and spoke to him through broker' Devaji Row, I said to him 'this first shipment has come late, in case the others arrive in thirty days regularly then only will I take them and if not I won't take them, he said all right. The second did not come in time within thirty days

VOLKART BROTHERS v. RUTNAVELU CHETTI.

from 20th July. So I wrote exhibit D (18th August 1890).' In exhibit D defendant stated he had up to date received no invoice of a further shipment and has there was again delay in the delivery he refused to further go on with the contract. In exhibit E which is reply to exhibit D, plaintiffs say 'it is quite impossible to ship goods in exactly one month's intervals as we must wait till a steamer is available to ship the same.' This I think shows clearly how the plaintiffs understood the expression *monthly intervals*, and that it meant at those intervals as nearly as possible; a pencil memorandum on exhibit D, which was produced by plaintiffs, is to the same effect. This letter exhibit E also to my mind reads as an excuse that no ship was available, but the witness Thomas proves that the '*Navarino*' left London on 19th July and as before remarked there is no evidence that there was no space available in her. Again on receiving advice of the arrival of the second shipment he repudiated his liability by exhibit H and referred plaintiffs to exhibit D. As to the interview between Mr. Schultzer and defendant's agent in July, Mr. Scholl, plaintiffs' witness and assistant, says he knew there had been a discussion between them and before the writing by plaintiffs of exhibit 3, (11th September 1890) that Mr. Schultzer told him in July defendant had complained that the first shipment had not come within contract time as it had arrived in July instead of in June, and had agreed to accept it provided the other lots arrived in time, and that he Mr. Schultzer had promised that future deliveries should be made regularly every month. Mr. Scholl also stated originally that exhibit D set out the complaint Mr. Schultzer had told him of and used the expression 'deliveries' should be made regularly every month, but changed to saying that the expression in exhibit D 'future deliveries should be made regularly every month' had escaped his notice and when he used the expression 'delivery' he meant 'shipment.' With reference to the defendant's agent's evidence and exhibits D, E, F and No. 3 it has been commented on by defendant's attorney that the plaintiffs have not examined Mr. Schultzer and the broker and it does seem extraordinary, for exhibit D refers to the interview about the late shipment of the first lot and the alleged promises and exhibit 3 refers to legal proceedings and the plaintiffs' ability to produce witnesses as to the agreement made.

I am of opinion that the proper construction of the contract A is that contended for by the defendant, viz., that the shipments were to be at monthly intervals from each other and it is proved that a ship left London for Madras on 19th July 1890, and there is no evidence that there was no room in it for defendant's goods. Plaintiffs further contend that, assuming the shipments were not in accordance with the terms of exhibit A, the defendant was not entitled to rescind the remainder of the contract, the agreement being for deliveries at different periods and divisible. The points to consider in reference to this question are whether it was one entire contract or several, and whether the time of shipment was of the essence of it, and I am of opinion that it was one entire contract and time of shipment was the essence of it. Upon the question of entirety of the contract the cases of *Hoare* v. *Rennie*(1), *Honck* v. *Muller*(2), *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.*(3) decide that where the agreement is for delivery of goods in monthly fixed portions, and that it is not carried out the contract is considered as a whole. *Hoare* v. *Rennie*(1) decided that where the quantity agreed to be delivered at a certain time was not so delivered to the vendee, it was an answer to a suit for non-acceptance. *Honck* v. *Muller*(2) decided that where the purchaser had not taken delivery of the first portion as agreed he could not insist on the vendor delivering the balance. The *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.*(3) decided that where the vendors wrongfully refused to make a further delivery on account of an agreement for monthly deliveries, the vendee was entitled to claim the fulfilment of the contract as a whole. In his judgment Lord Bramwell gave his opinion that *Hoare* v. *Rennie*(1) had been rightly decided. In this case if the proper construction of the contract is that monthly intervals means shipments at intervals of a month, there was no shipment within that period and thus it is within the principle of *Hoare* v. *Rennie*(1).

The plaintiffs rely on *Simpson* v. *Crippin*(4) as showing that partial failure as to one instalment or delivery does not entitle the promisor to refuse to complete the contract, and this it certainly does, but *Honck* v. *Muller*(2) and *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.*(3) are later cases and were decided by the

(1) 5 H. & N., 19.
(2) L.R., 7 Q.B.D., 92.
(3) L.R., 9 App. Cases, 434.
(4) L.R., 8 Q.B., 14.

VOLKART BROTHERS v. RUTNAVELU CHETTI.

Court of Appeal and the House of Lords. From the remarks made in *Cutter* v. *Powell*(1), I am led to the conclusion that these two latter cases are now considered to give the law on the point.

As to time being the essence of the contract I have already remarked that at any rate it was so in the mind of the defendant, for he fixed a specific interval for the shipments to be made and defendant's agent's evidence and the exhibits E and No. 3 show that plaintiffs also considered that time of delivery was one of the essential ingredients of the contract. Lord Cairns in *Bowes* v. *Shand*(2) says 'therefore it may well be that a merchant making a number of rice contracts, ranging over several months of the year, will be desirous of expressing that the rice shall come forward at such times and at such intervals of time, as that it will be convenient for him to make the payments and it may well be that a merchant will consider that he has obtained that end if he provides for the shipment of the rice during a particular month or during particular months, and that he will know provided he had made that stipulation the rice will not be forthcoming at a time when it will be inconvenient for him to provide the money for the payment,' and again at page 465, the non-fulfilment of any term in a contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled.

I am of opinion under the circumstances above set out that there was a breach of the contract by the plaintiffs in not shipping the second shipment within an interval of a month from the 18th June 1890, that it was one contract for the purchase of one hundred and twenty cases of tins of Swiss milk (see judgment of Lord Selborne in *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.*(3)) and that time was the essence of the contract and defendant was entitled to rescind or cancel the remainder of the contract (section 55, Contract Act) and that defendant exercised his right by exhibits D, F and H; and contingent upon the opinion of the High Court upon the two questions hereunder submitted, I give judgment for the defendant and dismiss the suit with costs.

The questions I beg to submit, are:—

(1) Smith's Leading Cases, vol. ii., p. 40. (2) L.R., 2 App. Cases, 455.
(3) L.R., 9 App. Cases, 434.

Whether upon the facts stated in the case the opinion I have formed as to the proper construction of agreement A is correct, viz., that the expression in it shipment in six lots of twenty cases each at monthly intervals means that the shipments were to be at intervals of a month from each other and not month by month, that is to say, in consecutive months ?

(2) Whether upon the facts stated in the case, the defendant was entitled to rescind the portion of the contract as to one hundred cases on the 18th August 1890, and did so by exhibit D or at any time, and did so by exhibits F (26th August 1890) and H (8th September 1890) ? "

Mr. *K. Anderson* for plaintiff.

Mr. *R. F. Grant* for defendant.

JUDGMENT—The first question referred for our opinion is what is the proper construction of the agreement, exhibit A. By that document the defendant agreed to purchase from the plaintiffs 120 cases of condensed milk which were to be shipped in London and delivered in Madras. The part of the agreement as to which there is a conflict is in these terms, " shipment in six lots of twenty cases each at monthly intervals."

On behalf of the plaintiffs it was contended that the expression " shipment at monthly intervals " means shipment in consecutive months or, as the learned Chief Judge puts it, shipment month by month, whereas the defendant contended that the expression meant that the shipment should be made at intervals of a month from each other.

It is not suggested on either side that the expression is used among merchants in any technical sense. Now the term " monthly " can only mean once a month or every month and the term " intervals " the time between two shipments. In the ordinary sense of the words therefore the expression " shipment at monthly intervals " means that there was to be an interval of one month between each shipment. As the learned Chief Judge observes, the importer wishing to arrange that his supplies should arrive at fixed periods would naturally stipulate that the date of shipment from the export country should be certain. He also refers to exhibit E, the letter written by the plaintiffs' firm on the 26th August, as showing that the plaintiffs understood that the term " monthly intervals " meant at intervals of a month as nearly as possible. It is urged by plaintiffs' Counsel that it would be

VOLKART BROTHERS v. RUTNAVELU CHETTI.

unreasonable to hold that the plaintiffs contracted to ship the twenty cases at exact intervals of one month as they would have to wait till a steamer was available or charter a special steamer for the conveyance of the twenty cases. There can be no doubt that in determining what is the construction to be put upon the term "shipment at monthly intervals," regard should be had to the possibility of finding a steamer available for shipment on or about the monthly interval as well as to the necessity for defendant getting his supplies at regular intervals.

The reasonable construction, therefore, is that the interval contemplated by the parties to the document was not precisely thirty days or one month, but one month more or less, regard being had to the time which it may be reasonable to allow to the plaintiffs for finding a steamer available for the required shipment.

This is in accordance with the rule mentioned by Cresswell, J., in *Wilson* v. *Bevan*(1) which he stated in these words:— "When the intention of the parties to a contract is sufficiently "apparent, effect must be given to it in that sense, though some "violence be thereby done to the words. Where the intention is "doubtful the safest course is to take the words in their ordinary "sense." In applying the rule it must also be observed that the hardship to either party is not an element to be considered unless it amounts to a degree of inconvenience and absurdity so great as to afford judicial proof that such could not be the meaning of the parties *Prebble* v. *Boghurst*(2).

With reference to the second question referred to us whether the defendant was entitled to rescind the contract, we observe that its decision depends upon a further question which contract was it which defendant claimed to be entitled to rescind. It appears that the first shipment was made on the 18th June and arrived at Madras on 22nd July. Defendant complained that the consignment had arrived late, and at an interview, plaintiffs' agent consented to accept delivery only on the assurance that future shipments or deliveries were regular. In their letter of the 11th September plaintiffs refer to his agreement as an agreement for "shipment in due course." The second shipment was made on the 27th July and arrived in Madras on the 6th September. Meanwhile on the 18th August defendant had written to plaintiffs (exhi-

(1) 7 C.B., 678. (2) I Swanston, 329.

bit D) in these terms :—"The first twenty cases should have been "*delivered* in the month of June, instead of which you delivered them "in July, when you promised that future deliveries would be made "every month." It will be observed that the defendant treated the original agreement (A) as one for "deliveries at monthly intervals" and that he regarded the agreement of July as an agreement for "deliveries regularly every month." The original contract was one for "shipment at monthly intervals" and the learned Chief Judge appears to hold that as the second shipment was not within one month from the date of the first shipment, defendant was entitled to repudiate the contract. That would depend upon the question whether the interval between the 18th June and 27th July was under the circumstances reasonable, regard being had to the time ordinarily necessary for finding a steamer available for the shipment.

If it was the agreement of July which defendant claimed to repudiate, there must be a finding what the terms of that agreement were, and whether with reference to the construction we put upon the term "monthly intervals" defendant was entitled to repudiate it.

We will ask the learned Chief Judge to return a finding upon these questions.

In compliance with the above order, Mr. N. Subrahmanyam, the Acting Chief Judge of the Court of Small Causes, submitted his finding as follows :—

FINDING.—My finding on the first question is that defendant claims to repudiate the original contract of 14th May 1890 under exhibit A. It will be seen by the statements filed by the Attorneys of both the parties that it is not the case of either party that there was any new agreement on 21st July 1891. Exhibits F, H, J and III also confirm their view; what really took place on that date was that plaintiff having made a default in the first shipment, defendant complained on this score and at the interview on 21st July 1890 all that happened was that defendant agreed to waive his right to rescind the whole contract and accept the delivery of the first shipment on plaintiffs' promising that future shipment should be regular as stipulated in the original contract A of 14th May. What happened, therefore, was an agreement to

VOLKART BROTHERS v. RUTNAVELU CHETTI.

stand by the original contract. The defendant makes plaintiffs understand more clearly, if possible, than before that time was of the essence of the contract.

It becomes unnecessary to give a finding on the second question.

Taking the third question to be whether the defendant was entitled to repudiate such new contract, it becomes unnecessary to give a finding on it. If the question is whether, with reference to the construction put by the High Court on the term monthly intervals, the defendant was entitled to repudiate, I agree with Mr. Shaw for the reasons given by him that defendant was entitled to repudiate the contract as the plaintiffs might have had the second shipment made by the steamer which left London on 19th July and he failed to do so.

This case came on for final disposal when the Court delivered judgment as follows :—

JUDGMENT.—The first question was already answered in the affirmative.

As to the second question also the answer must be in the affirmative on the findings now submitted.

Wilson & King, attorneys for plaintiff.

Branson & Branson, attorneys for defendant.