APPELLATE CIVIL.

Before Sir William Ayling, Kt., Officiating Chief Justice, and Mr. Justice Odgers.

1921, October, 3 and 13.

K. M. P. R. N. M. FIRM (PLAINTIFFS), APPELLANTS,

v.

P. T. THEPERUMAL CHETTY (DEFENDANT), RESPONDENT.*

Contract Act (IX of 1872), sec. 62—Breach of original contract—Substitution, rescission or alteration—English doctrine, whether applicable.

There is nothing in section 62, Contract Act, to imply that the substitution, rescission or alteration of a contract, after its breach, must be supported by consideration. The English doctrine on the subject is not applicable to India.

Manohur Koyal v. *Thakur Das Naskar*, (1888) I.L.R., 15 Calc., 319, disapproved.

Observations of KUMARASWAMI SASTRI, J., in *Ramiah Bhagavatar* v. *Somasi Ambalam*, (1915) 29 M.L.J., 125, followed.

ON APPEAL from the judgment and decree of Mr. Justice KRISHNAN passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court of Madras in C.S. No. 284 of 1919.

The material facts are set out in the judgments.

G. Krishnaswami Ayyar for appellants.

Venkatasubba Rao and *Radhakrishnayya* and *V. V. Devanatha Ayyangar* for respondent.

AYLING, OFFG. C.J.

AYLING, OFFG. C.J.—The transaction out of which this suit arises took place in July 1918, a time when speculation in piece-goods was very brisk. Plaintiffs sold to defendant fourteen bales of bleached mull; the goods were lying at the time with Muruganatha

* Original Side Appeal No. 102 of 1920.

Chetty and Sons from whom plaintiffs had apparently themselves purchased them and whose shop was close to defendant's shop. Defendant in his turn sold the bales to one Amir Chund Idanmull giving him a delivery order on Muruganatha Chetty. Idanmull refused to take delivery of six out of the fourteen bales on the ground of unsoundness. Defendant complained to plaintiffs, who undertook to replace them by six sound bales, and induced defendant to take charge of the six bales left in Muruganathan's hands. This defendant did; but plaintiffs failed to exchange them for sound bales. Early in September prices fell heavily in consequence of the looting riots: and when plaintiffs subsequently offered to deliver six sound bales, defendant said it was too late. After some negotiation it was agreed that the sale contract in respect of these six bales should be cancelled. Plaintiffs took back three bales, but did not take delivery of the balance and now sue for the price of the whole quantity. The above is defendant's version which is spoken to in evidence and which the learned Trial Judge has found to be true. Plaintiffs deny any undertaking to replace the six bales, or agreement to cancel the sale in respect of them; and sue on the basis of a completed sale.

On a consideration of the evidence I have no hesitation in agreeing with the learned Trial Judge for the reasons given by him in accepting the defendant's story as to the circumstances in which he came to be in possession of the six bales, and as to the agreement to cancel the sale in respect of them. This would entail the dismissal of plaintiffs' claim for the price of the six bales, vide section 62 of the Indian Contract Act.

Appellants' vakil's main argument before us has in fact been that section 62 has no application, because the agreement to cancel the sale as regards the six bales

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was made after the defendant had broken the contract by omission to pay for the goods delivered. For this proposition of law he relies on *Monohur Koyal* v. *Thakur Das Naskar*(1).

Mr. G. Krishnaswami Ayyar assures us that this argument was addressed to the learned Trial Judge, although there is no reference to it in the latter's judgment. It rests on the assumption that there was a breach of the contract before the agreement for cancellation and this is certainly neither found nor admitted, nor is it raised in any of the issues in the case. Before this plea of the plaintiffs could be admitted, the fact of breach would have to be decided in their favour; and we should have to call for a finding on a properly framed issue.

I do not think we are either called upon to do this or should be justified in so doing. The learned Judges in *Monohur Koyal* v. *Thakur Das Naskar*(1), undoubtedly lay down the proposition that the provisions of section 62 do not apply after there has been a breach of the original contract. But with all respect I fail to see any justification for this restriction of the operation of the section on the mere fact that it would otherwise contravene a somewhat technical rule of English Law. Section 63 was admittedly enacted in direct antagonism to English Law. Why should not section 62 be accepted at its face meaning in spite of a similar antagonism: I agree in this connexion with the remarks of KUMARASWAMI SASTRI, J., in *Ramiah Bhagavatar* v. *Somasi Ambalam*(2).

The present case at the time of the alleged cancellation was eminently one for amicable settlement. Plaintiffs were presumably urging that defendant had received goods according to contract and was bound to

(1) (1888) I.L.R., 15 Calc., 319. (2) (1915) 29 M.L.J., 125.

pay for them. Defendant was similarly complaining that plaintiffs had neither delivered proper goods in the first instance nor replaced them within a reasonable time, as promised. Whether the six bales were as a matter of fact sound or unsound was a somewhat moot point depending on alleged defect in packing. In such circumstances it seems to me both reasonable and desirable that the parties should be allowed to cancel the contract as far as these bales are concerned. Section 62 on the face of it allows them to do so; and unless compelled by stronger authority or reasoning I see no reason to decline to give effect to it.

I therefore agree with the learned Trial Judge's rejection of plaintiffs' claim.

The only other point argued is as to costs in relation to the sum of Rs. 1,040, to which defendant admitted plaintiffs' claim and which defendant discharged out of Court. I see no reason to interfere with the Trial Judge's discretion as to awarding proportionate costs on this sum.

I would dismiss the Appeal with costs.

ODGERS, J.—This is a suit for the recovery of the balance of the price of fourteen bales of piece-goods sold by plaintiffs to defendant on 23rd July 1918. The defendant admitted by his written statement that a sum of Rs. 1,040-2-0 was due to the plaintiffs as balance of price of eight out of the fourteen bales and that as to the remaining six bales the contract had by mutual consent been rescinded. The plaintiffs had the fourteen bales in question with a firm called Muruganathan Chetty and the former gave the defendant a delivery order on that firm; the defendant endorsed the delivery order to one Amirchand Idanmull to whom he had in his turn sold the goods. The Chetty firm delivered the goods to

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Idanmull, who rejected six of the fourteen bales as being unmerchantable as the packing was damaged. The defendant's case is that on Idanmull's rejection of the six bales, he, the defendant, complained to plaintiffs' agent, Satagopa Pillai, and the latter promised to take back the six bales and replace them by six others. This was in July. On or about 24th September Satagopa Pillai offered the new bales, but the price having dropped by that time, defendant refused them and he and Satagopa Pillai agreed that the latter should take back the bales and that the contract should be cancelled with reference to them. Some question has been raised on the fact that three of the bales remained with defendant after the date of the alleged cancellation, but this is in my opinion satisfactorily explained by the evidence of the defendants' witnesses Nos. 1 and 2. I have carefully considered the evidence and I have come to the conclusion that the finding of the learned Judge, that the cancellation alleged has been proved, is justified by the evidence. Satagopa Pillai, the plaintiffs' agent with whom the contract was made and who is said to have entered into the agreement cancelling the contract as to the six bales, was not called at the trial.

On Appeal, however, a point of law which does not seem to have been argued at the trial has been taken. It is said that the plaintiffs must succeed as the agreement to cancel is a mere *nudum pactum*, being without consideration and therefore illegal. It is said that section 62 of the Indian Contract Act which at first sight governs this case does not in fact do so as it has no application to substitution, rescission or alteration, after breach of the original contract. It is undoubtedly the English Law, arising from the evolution of the doctrine of consideration in that system, that a new contract after breach of the original one must be supported by consideration.

As EYRE, C.J., said in *Lynn* v. *Bruce*(1) :

"Accord executed is satisfaction ; accord executory is only substituting one cause of action in the room of another which might go on to any extent."

So an agreement to abandon a claim is said to be a mere *nudum pactum*. It will be remembered that in *Foakes* v. *Beer*(2), in which the necessity for fresh consideration was affirmed, Lord BLACKBURN went so far as to write an opinion dissenting from that of the majority of the Lords, but finding himself in the minority he did not deliver it.

This doctrine in fact applies only to executory contracts. I am not altogether satisfied that there has been a breach in this case. The fourteen bales were delivered and six were rejected, but there was as far as I can discover no time for delivery fixed by the contract, nor can I find any evidence that defendant treated the rejection by his purchaser as a breach of contract on the part of the plaintiffs. Defendant seemed to be perfectly satisfied with the assurance of plaintiffs' agent that fresh bales would be substituted in a few days time. I think there is something to be said for the view that the contract as regards the six bales was not executed, and that before execution or even before the time for performance the parties agreed to confine the operation of the original contract to eight bales only, i.e., they altered the original contract so as to include eight bales only. If this view is correct, there is of course no doubt that section 62 applies and the parties were at perfect liberty to do this. I assume, however, for the purpose of this judgment that this view is wrong and that there was a breach of the original contract to deliver fourteen bales and that the agreement to cancel the contract as to the

(1) (1794) 2 Hy. & Bl., 317 ; s.c., 3 R.R., 381
(2) (1884) 9 App. Cas., 605.

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six bales was only arrived at after a breach of the original contract.

It is said that this doctrine of the English Law is embodied in section 62 and that the words "before breach" must be read into the section. Reliance is placed on *Monohur Koyal* v. *Thakur Das Naskar*(1), where it was held that section 62 is a legislative expression of the common law and its provisions do not apply to a case where there has been a breach of the original contract before the subsequent agreement is come to. There, the Court found as a fact that the plaintiffs did not intend to accept defendant's mere promise to pay cash and give a bond. He neither paid nor tendered the bond. Had the finding been that plaintiffs did so intend to accept these promises in satisfaction of the original contract, I gather the judgment would have proceeded on different lines. Why cannot we hold in the present case that the mutual arrangement to waive delivery on the one side and to waive payment on the other was a satisfaction of the original contract? AS SUBRAHMANYA AYYAR, J., put it in *Davis* v. *Kundasawmi Mudali*(2):

"The former case (i.e., section 62) *ex hypothesi* necessarily implies consideration which is either the mutual renunciation of right or coupled with it the mutual undertaking of fresh obligations or the renunciation of some right on the one side and the undertaking of some obligation on the other, that forms the consequence of an agreement to rescind, substitute or alter mentioned in section 62."

It appears to me therefore that there is ground for saying that *Monohur Koyal* v. *Thakur Das Naskar*(1) is different from that before us, and that in the latter the mutual renunciation of right can be treated as satisfaction of the original contract. It appears, moreover, to me to be somewhat remarkable to hold that

(1) (1888) I.L.R., 15 Calc., 319. (2) (1896) I.L.R., 19 Mad., 398.

section 62 imports the highly technical rule of English Law. If the section were only intended to apply before breach, why does it not say so? The form of the English plea (on which most of the old cases proceed), as set out in *Monohur Koyal* v. *Thakur Das Naskar*(1), was

"that after the alleged contract and before any breach thereof, etc."

It seems on principle unreasonable to import into the plain words of the section a modification based on such technical grounds. Further, there is authority for saying that section 63 "not only modifies but is in direct antagonism to the law in England"—*Monohur Koyal* v. *Thakur Das Naskar*(1) : see also *Davis* v. *Kundasawmi Mudali*(2), which holds that an agreement under section 63 does not require consideration to support it and where the English Law is considered. As SUBRAHMANYA AYYAR, J., said (page 402):

"Now the question arises whether the Indian Legislature intended to perpetuate such an unsatisfactory state of things in this country. I think that it did not, that in the Contract Act the doctrine of consideration was not extended to the regulation and restraining of the discharge of contract by agreement and that the Legislature laid down by section 63 a rule different from that of the English Law."

It is highly improbable that of these two sections, section 62 and section 63, the latter should constitute a clear modification of the English Law as to the requirement of consideration, while the former should be held (by implication and without any suggestion to that effect in the wording itself) to import the highly technical doctrine of accord and satisfaction. With great deference to the learned Judges who decided in 1888 *Monohur Koyal* v. *Thakur Das Naskar*(1), above referred to, I cannot think that there was any such intention

(1) (1888) I.L.R., 15 Calc., 319. (2) (1896) I.L.R., 19 Mad., 398.

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Further, we have the Madras case *Ramiah Bhagavatar* v. *Somasi Ambalam*(1). Of the learned Judges, SESHAGIRI AYYAR and KUMARASWAMI SASTRI, JJ., who decided that case, the former was "not as at present advised prepared to dissent from *Monohur Koyal* v. *Thakur Das Naskar*(2)" but based his judgment on another ground. The latter distinctly disapproved of the doctrine in *Monohur Koyal* v. *Thakur Das Naskar*(2). He said:

"I do not think that Courts should engraft on the plain meaning of the provisions of Indian enactments, limitations founded on technical rules of English Law and pleading, especially in cases where such limitations are not suited to the conditions prevailing in this country."

With these observations I respectfully agree and following that learned Judge, I am prepared if necessary to dissent from *Monohur Koyal* v. *Thakur Das Naskar*(2) for the reasons I have set out above.

I agree with the order as to costs proposed by my Lord.

On all these grounds the judgment of the learned Judge must be confirmed and the Appeal dismissed with costs.

M.H.H.

(1) (1915) 29 M.L.J., 125. (2) (1888) I.L.R., 15 Calc., 319.