

period subsequent to the date of the defendant's auction purchase. In our judgment the plaintiffs should have been granted a decree for redemption on their paying to the defendant Rs. 7,164-5-0. We vary the decree below by substituting Rs. 7,164-5-0 for Rs. 2,100, as the amount upon payment of which, with the proportionate costs of the defendant-appellant here and in the Court below, the plaintiffs will obtain redemption of the property in suit. We extend the time for the payment of the said amount to the 15th of December 1897, and we award to the plaintiffs costs proportionate to their success here and in the Court below.

Decree modified.

Before Mr. Justice Banerji and Mr. Justice Aikman.

PRAG NARAIN (DEFENDANT) v. MUL CHAND AND OTHERS (PLAINTIFFS).
Act No. IX of 1872 (Indian Contract Act) section 107—Sale—Non-payment of purchase money—Resale—Right of resale to be exercised within a reasonable time of breach—Measure of damages.

In the case of a sale, if the purchaser does not perform his part of the contract, he is liable in damages to the seller, the measure of damages being the difference between the contract price and the price which the seller could have obtained for the article at the time of the breach of contract.

If a vendor, on breach of contract by non-payment of the purchase-money, elects to exercise the right of re-sale given to him by section 107 of the Indian Contract Act, 1872, not only is the vendor bound to wait a reasonable time after giving notice to the vendee of his intention to re-sell before actually re-selling, but he is also bound to exercise his right of re-sale within a reasonable time after the date of the breach.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. D. N. Banerji, for the appellant.

Messrs. W. K. Porter and E. C. F. Greenway, for the respondents.

BANERJI and AIKMAN, JJ.—This was a suit for damages for breach of a contract entered into with the plaintiffs respondents on the 11th of September 1891, by Munshi Nawal Kishore, the original defendant to the suit, who has died since its institution and is now represented by the appellant, whereby Munshi Nawal

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* First Appeal No. 74 of 1895, from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Cawnpore, dated the 16th December 1895.

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Kishore purchased from the plaintiffs 500 shares owned by them in the Cawnpore Cotton Mills Company for a consideration of Rs. 40,000. A contract in writing was signed by Munshi Nawal Kishore. It was agreed that the price should be paid and the share-certificates delivered on the 25th of September 1891. On that date the plaintiffs sent a telegram to Munshi Nawal Kishore reminding him of the fact that the price was due and asking him to send it promptly. No payment was made. Both the parties agree that a few days afterwards a conversation took place between Munshi Nawal Kishore and Jaggi Lal, one of the plaintiffs, at the office of the Victoria Cotton Mills Company at Cawnpore. As to the nature of the conversation the parties are at variance. While Munshi Nawal Kishore alleged that Jaggi Lal released him from liability under the contract, Jaggi Lal denies that he did so. On the 10th of October 1891, Munshi Nawal Kishore caused a letter to be despatched from Lucknow to the address of the plaintiffs at Cawnpore in which he stated that the contract had by mutual consent been cancelled, and asked Jaggi Lal to intimate that fact to Munshi Nawal Kishore by letter. Whether that letter reached the plaintiffs or not is a matter in issue between the parties. Nothing took place afterwards until the 6th of August 1892, when Messrs. Sanderson and Company, Solicitors, on behalf of the plaintiffs wrote a letter to Munshi Nawal Kishore demanding from him Rs. 40,000, the price of the shares purchased by him, with interest thereon at Rs. 7 per cent., and informing him that if payment was not made and delivery of the shares was not taken within one week of the date of the letter the shares would be sold at his risk and he would be sued for the difference. To this letter Munshi Nawal Kishore replied through his pleader denying that he had entered into any contract for the purchase of shares in the Cawnpore Cotton Mills Company. On the 17th of September 1892, the plaintiffs caused the 500 shares to be sold at auction by one Mr. Noronha, and they realized Rs. 28,810. The plaintiffs brought the present suit claiming the difference of Rs. 11,190, together with interest, the amount of commission alleged to have been paid to

Mr. Noronha, and the fees paid to Messrs. Sanderson and Company for the letter of demand. The total amount claimed was Rs. 14,812-11-6. The lower Court has made a decree in favour of the plaintiffs for Rs. 11,190 and dismissed the remainder of the claim. Against this decree the defendant has preferred this appeal, and the plaintiffs have taken objections under section 561 of the Code of Civil Procedure.

The pleas raised on behalf of the appellant are twofold, first that the Court below has erroneously held that the allegation of the defendant as to his having been released from liability by the plaintiffs was not proved, and secondly, that in any case the plaintiffs ought to have resold the shares within a reasonable time from the date of the breach of contract by Munshi Nawal Kishore, and that they could only claim as damages the difference between the contract price and the market price of the shares on the date of the breach of contract.

As regards the first plea we agree with the conclusion arrived at by the Court below. The statement of Munshi Nawal Kishore was that after he had entered into the contract on the 11th of September, 1891, he came to Allahabad and there learnt that the affairs of the Company were in an unsatisfactory condition and that he would sustain a loss by his purchase; that in October following he met Jaggi Lal and Mul Chand, plaintiffs, at the office of the Victoria Cotton Mills Company in the presence of Mr. West, the Manager of that Company; that he spoke to Jaggi Lal about what he had learnt at Allahabad; that thereupon Jaggi Lal said to him that if he, Munshi Nawal Kishore, apprehended any loss he need not take the shares; that he might write and say that the transaction was cancelled and that he, Jaggi Lal, would send an answer to the same effect. Munshi Nawal Kishore further stated that in accordance with this conversation he wrote the letter of the 10th of October, 1891, referred to above and sent it under a cover addressed to Mr. West; that subsequently in November he met Jaggi Lal and Mul Chand at Cawnpore, and on that occasion also Jaggi Lal reaffirmed what he had said before as to the cancellation of the

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contract. Jaggi Lal on the other hand has sworn that when Munshi Nawal Kishore asked him to cancel the contract of sale, he, Jaggi Lal, refused to do so and said he would bring a suit, and that Munshi Nawal Kishore would have to pay the money with interest at 7 per cent. He denies having received the letter of the 10th of October. We are unable to accept in its entirety either version of the conversation which took place at the office of the Victoria Cotton Mills Company between Munshi Nawal Kishore and Jaggi Lal. It seems to us to be in the highest degree improbable that Jaggi Lal, who on the preceding 25th of September had telegraphed to Munshi Nawal Kishore for payment and was evidently anxious to enforce the contract, at once consented to release Munshi Nawal Kishore from liability for the breach of contract, which had already taken place, as soon as Munshi Nawal Kishore asked him to do so. It is true that it has been proved that the letter of the 10th October printed at page 30 of the appellant's book was despatched from Lucknow on that date, and it is probable that it reached Jaggi Lal. But the circumstances of Jaggi Lal's not replying to it and of his retaining in his hands the written contract signed by Munshi Nawal Kishore leave no room for doubt that Jaggi Lal never acceded to Munshi Nawal Kishore's request to discharge him from liability. The truth seems to lie between the statements made by Munshi Nawal Kishore on the one hand and Jaggi Lal on the other. It is most likely that Jaggi Lal, instead of refusing positively to accept Munshi Nawal Kishore's proposal, gave him an evasive answer, and that Munshi Nawal Kishore, not having received Jaggi Lal's assent to his proposal, wrote the letter of the 10th of October 1891, simply with a view to make evidence. The answer sent on behalf of Munshi Nawal Kishore in reply to the letter received by him from Messrs. Sanderson and Company was, to say the least of it, disingenuous. He certainly knew that he had signed a contract, the other party to which was the plaintiff Mul Chand, and it was certainly not the fact, upon his own admissions, "that he never had any negotiations or agreement with Lala Mul Chand regarding the

sale of shares in the Cawnpore Cotton Mills Company, Limited," as stated in the letter of his pleader, dated the 18th of August, 1892, printed at page 19 of appellant's book. We are therefore unable to accept Munshi Nawal Kishore's statement that Jaggi Lal released him from liability.

As regards the second plea we agree with the contention of the learned counsel for the appellant that in the case of a sale, if the purchaser does not perform his part of the contract, he is liable in damages to the seller, the measure of the damages being the difference between the contract price and the price which the seller could have obtained for the article at the time of the breach of promise. This is evident from illustrations (a) and (d) to section 73 of the Indian Contract Act. In this case the plaintiffs have, under section 107 of that Act, claimed compensation for the loss sustained by them on the re-sale of the shares purchased by the defendant on which the plaintiffs had a lien for the unpaid price. It has been contended on behalf of the appellant that if the plaintiffs elected to exercise the right of re-sale which they had under section 107, they were bound not only to re-sell the property after a reasonable time from the date of their giving notice to the buyer of their intention to re-sell it, but they were bound to exercise their right of re-sale within a reasonable time after the date of the breach. Section 107 in explicit terms requires that if the seller who has a lien for the unpaid price wishes to re-sell the goods sold, he must allow a reasonable time to elapse between the date of his giving notice to the buyer of his intention to re-sell and the date of the re-sale. But the section does not in terms provide that the right to re-sell should be exercised within a reasonable time from the date of the breach of contract. On this point the section is silent. We have therefore to look to general principles as a guide for determining the question whether a buyer who wishes to re-sell the goods sold must do so within a reasonable time from the date on which the contract was broken or whether he may do so at any time after the date of the breach. A buyer, it is true, may claim the price at any time after the stipulated date for payment has

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expired, if not precluded from doing so by the law of limitation, but if he chooses to enforce his right to re-sell, he must, it seems to us, do so within a reasonable time from the date of the breach, and should not allow the value of the goods to depreciate by making undue delay in re-selling them. In *Mayne on Damages*, 5th edition, p. 176, it is stated on the authority of *Pott v. Flather* (1) that "as there is no obligation on the part of the vendor to sell at all, so if he refrains from selling at the time of the breach he takes upon himself all risk arising from further depreciation." In *Addison's Law of Contract*, 9th edition, p. 526, the rule on the subject is thus stated:—"If the goods have been re-sold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of the damages will be the difference between the price agreed to be given and the price realized on the re-sale, with the costs and expenses of the re-sale, but if the re-sale has been unreasonably delayed until the market has fallen, the price realized on such re-sale will not afford a true criterion of the damage." These are authorities for holding that if the seller elects to re-sell, he must do so within a reasonable time from the date on which the contract was finally repudiated by the buyer. Any other conclusion might cause undue hardship to the buyer. A seller may, with the deliberate intention of causing loss to the buyer, delay the re-sale until the market has fallen and then re-sell the property, and thereby cause to the buyer a loss which he might not have sustained had the re-sale taken place within a reasonable time from the date of the breach of contract. In the case of a re-sale the buyer is entirely deprived of his property and that distinguishes the case of a claim for damages upon a re-sale from that of a claim for the unpaid price. In the latter case the buyer would get the property and be in a position subsequently to compensate himself by waiting for a rise in the market. In our opinion the plaintiffs ought to have re-sold the shares sold by them within a reasonable time from the date on which the contract was finally repudiated by *Munshi Nawal Kishore*. We may take the 10th of October, 1891,

as the date on which such repudiation finally took place. The plaintiffs would have been justified in waiting for a reasonable time before electing to re-sell, and they were bound under section 107 of the Indian Contract Act to allow a reasonable time to elapse between the date of their giving notice to the buyer of their intention to re-sell, and that of the actual re-sale. We hold that under the circumstances of this case the reasonable time after which the shares in question should have been re-sold expired on the 31st of December 1891, and that the plaintiffs are entitled to recover as damages the difference between the contract price and the price of the shares which prevailed on the 1st January 1892. There is no evidence on the record which can enable us to ascertain the value of the shares on the date last mentioned. The Subordinate Judge in our opinion improperly excluded an important piece of evidence, namely, the register of the transfer of shares of the Cawnpore Cotton Mills Company, Limited. We accordingly refer to the Court below the following issue under section 566 of the Code of Civil Procedure:—

What was the value of the shares in question on the 1st of January 1892?

The Court below will receive such further evidence as may be tendered by the parties. On receipt of the finding ten days will be allowed for objections.

Issue referred.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

HARGU LAL SINGH (PLAINTIFF) v. GOBIND RAI AND ANOTHER
(DEFENDANTS).*

Mortgage—Sale by mortgagor of part of the mortgaged property—Suit by mortgagee for sale without joining vendee—Subsequent suit to eject mortgagor's vendee—Cause of action.

A mortgagor, who had given a simple mortgage over certain land, sold some of the mortgaged property. The mortgagee, after such sale had taken

* Second Appeal No. 452 of 1896, from a decree of J. W. Muir, Esq., District Judge of Saharanpur, dated the 2nd May 1896, reversing a decree of Pandit Kanhaya Lal, Munsif of Saharanpur, dated the 3rd August 1895.

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