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the property out of the limitations of the Act, and rendered it under section 15 subject to the ordinary Hindu law, according to which the appellant and respondent as representing two lines of agnates would divide the property.

There was a further suggestion that as Dilraj Kunwar, if she succeeded by inheritance, would only have succeeded to a Hindu woman's estate, which is a limited one without power of bequest, and with only certain powers of transfer *inter vivos*, while the effect of the will had been to give her an absolute estate, the will would have broken the line even if she had been the next heir. But it is unnecessary to consider this point. Upon the whole, their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Barrow, Rogers and Nevill.*
Solicitors for respondents: *James Gray and Co.*

MUHAMMAD HABIB-ULLAH (APPELLANT) v. BIRD AND COMPANY (RESPONDENT).

[On appeal from the High Court at Allahabad.]

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Sale of goods—Failure to deliver at agreed time—Extension of time—Failure to deliver within extended time—Damages—Loss of profit—Indian Contract Act (IX of 1872), sections 55, 63.

When after the seller of goods has failed to deliver them at the agreed time the buyer has agreed to an extension of time for delivery, the effect of section 55 of the Indian Contract Act is that the buyer is entitled to damages computed in the ordinary way if the seller fails to deliver within the extended time. The promise for the non-performance of which the third paragraph of section 55 provides that compensation cannot be claimed is the promise to deliver at the time originally agreed. Where the measure of damages for a failure to deliver is the loss of the profit which the buyer would have made from delivering the goods under a contract of sale which he has made, it is not material that the buyer by delivering under that contract other goods which he has in stock has made as much profit as he would have made if there had been no failure to deliver to him.

Judgment of the High Court affirmed.

APPEAL (No. 126 of 1919) from a judgment and decree of the High Court (the 16th of June, 1917), varying a decree of the Court of Small Causes, exercising the powers of a Subordinate Judge of Agra.

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* *Present:*—Lord DUNEDIN, Lord PHILLIMORE and Mr. AMEER ALI.

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In March, 1913, the appellant entered into a written agreement to sell to the respondents 4,000 sal railway sleepers at Rs. 1-15 per cubic foot, to be delivered by the 30th of May, 1913; as a term of the contract the appellant deposited Rs. 5,000 with the respondents and agreed to a penalty of 8 annas per cubic foot for sleepers not delivered by the 31st of May, 1913. The respondents had previously contracted to supply sleepers to the Bengal-Nagpur railway. By a letter of the 14th of May, 1913, the appellant informed the respondents that 2,000 sleepers were ready for inspection, and of these 1,746 were passed by the railway company on the 28th of June, 1913, and were accepted by the respondents. No further sleepers were delivered. In December, 1913, the respondents having threatened to exact the penalties, the appellant refused to make any further deliveries, and commenced the present suit.

The appellant by his plaint alleged that the respondents by delay in inspecting and removing the sleepers had caused him loss and had rendered performance impossible before the 31st of May; he further alleged that time was not of the essence of the contract and that there had been a waiver of delivery in the time agreed. He claimed the return of the Rs. 5,000 and damages. The respondents by their written statement denied the alleged delay, and alleged that at the request of the appellant's agent the time for delivery had been extended by them to the 30th of November, 1913. They claimed to deduct from the deposit the profit which they would have made under their contract with the railway upon the undelivered sleepers.

The trial judge held that the appellant was entitled to the return of his deposit of Rs. 5,000 and to Rs. 5,000 as damages. The High Court, upon an appeal, found that the time for performance of the contract had been extended by the parties to the 30th of November, 1913, and that the appellant, and not the respondents, were to blame for the non-performance by that date. They held that the respondents had suffered Rs. 3,345 damages and were entitled to deduct that sum from the deposit. Both Courts held that the suit was cognizable by the trial judge as the final acceptance of the contract was at Agra. The effect

of the judgments in India appear more fully from the judgment of the Judicial Committee.

The 23rd, 25th, 26th November, 1920.—*Dunne, K. C.*, and *Hyam* (*Dube* with them) for the appellant. *De Gruyther, K. C.*, and *Du Parcq* for the respondents.

The arguments were substantially upon the facts, it being contended on behalf of the appellant that he was not responsible for the failure to deliver by the 31st of May, that his agent had no authority to agree to an extension of time, and that in the absence of any request by the appellants the respondents had not an option, under the Indian Contract Act to extend the time for performance.

1921, February 14.—The judgment of their Lordships was delivered by Lord DUNEDIN :—

The present appeal arises out of a contract made between the appellant and the respondents by which the appellant was to supply 4,000 sleepers of a special pattern at any station on the Bengal-Nagpur Railway by the 31st of May, 1913. As a condition of the contract, the appellant had to deposit and did deposit Rs. 5,000 with the respondents as security for liquidated damages at a certain rate per foot for all sleepers not delivered on the said 31st of May. The sleepers had to pass inspection. Only 1,746 sleepers were delivered and passed inspection. The time for delivery was extended, but no more deliveries were made and the parties in December, 1913, broke off negotiations. The appellant then raised action asking for (1) the return of the deposit; and (2) damages in respect of his profit on the balance of sleepers not supplied. The respondents counter-claimed for damages in respect of sleepers not delivered.

The Subordinate Judge held that time was of the essence of the contract as originally made, but that the respondents had by delaying inspection not given the appellant proper opportunity of supplying the whole of the sleepers by the 31st of May; that thereafter both parties were willing and anxious that the contract should go on, time being, he held, under these circumstances no longer of the essence. He further held that when in the month of December the respondents alleged non-performance, and maintained that they would claim the penalty, that was equivalent

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to putting an end to the contract on their part, and he gave judgment for a return of the deposit and for damages calculated on the profit which would have accrued in respect of the unsupplied balance. On appeal, this judgment was reversed. The High Court, agreeing with the Subordinate Judge that time was of the essence of the contract as originally made, held that the fault in non-delivery by that date lay with the appellant, who never had 4,000 sleepers ready for delivery by that time, and could not excuse himself because at one particular station of the railway there was no room to lay out 4,000 sleepers at one time. They held that the respondents had excused non-delivery at the 31st of May, and had in response to application to that effect by the appellant's agent, allowed the time of delivery to be prorogued until the 30th of November; that non-delivery having been then made the appellant was in breach; that, although the liquidated damages condition could no longer apply, the respondents were entitled to damages for the non-delivered portion on the calculation of the profit which they would have made comparing the price under the principal contract with the Railway Company with the price they had to pay under the contract with the appellant. They accordingly dismissed the appellant's claim for damages, and gave him a decree for the deposit under deduction of the damages due to tho respondents as above calculated.

The view of the evidence which commended itself to the High Court is set out with great minuteness in the judgment of the High Court, and as their Lordships agree with the learned Judges, they do not think it necessary to repeat what is there said. The crucial facts are as follows:—(1) Time was of the essence of the original contract; (2) the appellant was in default in not making complete delivery in time *i.e.*, at 31st of May, 1913; (3) the appellant applied for and was granted by the respondents an extension of time until the 30th of November, 1913, for delivery of the balance over the 1,746 sleepers which had been delivered; and (4) delivery of the balance was not made by the respondents on the 30th of November, and they were consequently in default. Their Lordships, however, think it necessary to give their opinion as to the law which applies to the above facts. The

first point is settled by the Indian Contract Act, which enacts, section 55, paragraph 1:—

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time would be of the essence of the contract."

The respondents here did not elect to void the contract; they held it as subsisting, and agreed to prorogue the time of performance. This they were entitled to do, see section 63 of the Indian Contract Act, which explicitly says so:—

"63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."

The learned Subordinate Judge in their Lordships' opinion misread the third paragraph of section 55; that paragraph is as follows:—

"If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."

This clearly means that the promisee cannot claim damages for non-performance at the original agreed time, not that he cannot claim damages for non-performance at the extended time, yet the learned Judge says:—

"Subsequent extension of time could not legally bind the plaintiff to complete it within the time so generously extended by defendant and intimated to plaintiff months after."

Now apart from the terms of the Indian Contract Act, the law is as laid down in *Tyers* v. *Rosedale and Ferryhill Iron Company* (1). Baron Martin in that case said:—

"The second question is one of law, and is a most important one—it arises over and over again every day in the ordinary transactions of mankind. It is this: There is a contract for the sale of goods to be delivered, say, in January or upon a day of January. On the day before the delivery is to take place the vendor meets the vendee and says: 'It is not convenient for me to deliver the goods upon the day named, and I will be obliged if you will agree

(1) (1873) L. R., 8 Ex., 305; (1875) L. R., 10 Ex., 195.

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that the goods shall be delivered at a later period,' and the vendee assents; or the vendee goes to the vendor and says: 'It is not convenient for me to receive the goods in January or upon the day named and will you agree that the delivery shall be postponed?' and the vendor assents; the latter is the present case, and the contention on the part of the defendants is that this puts an end to the contract, and that the defendants are not bound to deliver upon the latter day. In my opinion, the contention is not well founded . . . It is impossible to distinguish the case of the application coming from the vendors and one coming from the vendee."

This opinion was affirmed in the Exchequer Chamber. The effect of the 55th section of the Indian Contract Act above quoted is, where the party having the option elects not to avoid, to put agreement after the original date on the same footing as an agreement as put by Baron Martin just before the original date. In England the matter is often complicated by the necessity of considering the 17th section of the Statute of Frauds and the 4th section of the Sales of Goods Act, but in the Indian Contract Act there is no section analogous to this. It is not necessary, therefore, to inquire whether the case of *Plevins* v. *Downing* (1) is or is not reconcilable with the case of *Tyers* v. *Rosedale and Ferryhill Iron Company* (2). Difficulties which confronted the Court in *Plevins* v. *Downing* (1) do not arise here, so that the law may safely be stated as in *Tyers* v. *Rosedale and Ferryhill Iron Company* (2). Where, as here, specific time is stated, then that substituted date must hold. If there were a simple waiver of the right to extension of the original time, then a reasonable time would be the proper time for delivery. It follows that there being no delivery on the 30th of November, the appellant was in breach, and damages are calculable in the ordinary way.

The appellant, however, before the Board argued that the damages could not be recovered, because as a matter of fact the respondents supplied the sleepers from other wood which they had and made a profit on that supply greater than the profit which they would have made by the contract wood. The answer to this argument is to be found in the well-known case of *Rodocanachi* v. *Milburn* (3), which was applied by the House of Lords in the recent case of *Williams* v. *Agius* (4).

(1) (1876) I C. P. D., 220.
(2) (1875) L. R., 10 Ex., 195.
(3) (1886) 18 Q. B. D., 67.
(4) (1914) A. C., 570.

"It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods."

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In the present case had the appellant supplied the timber the respondents would have made their profit and would have still had the other timber to sell, upon which they were entitled to make such profit as they could.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitor for appellant:—*Douglas Grant.*

Solicitor for respondents:—*Orr, Dignam and Co.*

Appeal dismissed.

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad.

1920. *October,* 25.

BALLU MAL AND ANOTHER (PLAINTIFFS) *v.* RAM KISHAN (DEFENDANT)*

Act No. IV of 1882 *(Transfer of Property Act), section* 41—*Ostensible owner—Duty of transferee to inquire into transferor's title—Transferor in possession as sister's son of last full owner—Duty of transferee to ascertain whether any collaterals existed.*

Defendant took a mortgage of a house from a person who was the son of a sister of the last full owner (a Hindu). The house was entered in the municipal register as in the possession of the mortgagor; but the mortgagee did not appear to have made any inquiry as to the title, although there was reason to suppose that he must have been aware of the existence of collaterals of the last owner. *Held,* on suit by the collateral heirs for recovery of possession of the house, that the defendant mortgagee, not having made proper inquiries as to his mortgagor's title, was not entitled to the protection afforded by section 41 of the Transfer of Property Act, 1882.

THE facts of this case are fully set forth in the judgment of the Court.

Dr. *S. M. Sulaiman,* for the appellants.

Dr. *Kailas Nath Katju,* for the respondent.

BANERJI and GOKUL PRASAD, JJ.:—This appeal arises out of a suit for possession of a house in the City of Cawnpore which

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* First Appeal No. 436 of 1917, from a decree of Muhammad Husain, Additional Subordinate Judge of Cawnpore, dated the 20th of September, 1917.