APPELLATE CIVIL.

Before Mr. Justice Martineau and Mr. Justice Moti Sagar.

GULAB RAI-SAGAR MAL (DEFENDANTS) Appellants,

versus

NIRBHE RAM-NAGAR MAL (PLAINTIFFS) Respondents.

1923

May 10.

Civil Appeal No. 1112 of 1922.

C. I. F. contract—shipping documents to be delivered against payment—time when the property in the goods passes to the buyer.

Held, that when the seller deals with, or claims to retain, the bill of lading in order to secure the price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that he former is not to be delivered to the buyer till acceptance or payment of the bill of exchange, the appropriation is not absolute but, until acceptance of the draft or payment or tender of price, is conditional only, and until such acceptance or payment or tender the property in the goods does not pass to the buyer.

Mirabita v. *Imperial Ottoman Bank* (1), per Cotton L. J. (referred to in Benjamin's Sale of Personal Property, Fifth Edition, page 377), *Ford Automobiles, Limited*, v. *Delhi Motor Engineering Company* (2), and Remfrey's Sale of Goods in British India, page 206, followed.

First appeal from the decree of Diwan *Som Nath, Senior Subordinate Judge, Delhi, passed in favour of plaintiffs on the* 18*th April* 1922.

TEK CHAND, for Appellants.

SARDHA RAM, for Respondents.

The judgment of the Court was delivered by—

MARTINEAU J.—The plaintiffs in this case sue for the price of 15 bales of white shirting, sold by them to the defendants, of which the latter refused to take delivery The goods had been imported by the firm of Mul Chand-Ganga Bishen of Delhi from England under a contract

(1) (1878) 3 Ex. D. 164. (2) (1922) 70 Indian Cases 138.

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made on the 19th November 1919, with *Haji* Ali Akbar and Sons of Manchester. Mul Chand-Ganga Bishen sold them to Chiman Ram-Badri Narain, who sold them to the plaintiffs, who on the 21st December 1919 sold them to the defendants. The contract between *Haji* Ali Akbar and Sons and Mul Chand-Ganga Bishen was a D. P. contract, that is to say, the documents were to be delivered against payment, and the drafts and shipping documents were sent by *Haji* Ali Akbar and Sons to the National Bank of India at Delhi. The amount due was paid to the Bank by Chiman Ram-Badri Narain on the 25th January 1921. The main questions in the case are—

(1) whether the property in the goods passed to the defendants;

(2) whether the goods offered to the defendants were in accordance with the contract, and

(3) whether the defendants waived their right to object to them.

The Lower Court has found on all these points in favour of the plaintiffs and has passed a decree for Rs. 31,050-12-0 with interest thereon at the rate of Re. 0-10-0 *per cent. per mensem* from the date of suit till realisation. The defendants appeal.

The bill of lading has not been produced and there is nothing to show in whose name it was made out, and as the contract between the shippers and importers was a C. I. F. contract it is contended for the respondents, and it has been held by the lower Court, that the property in the goods passed to Mul Chand-Ganga Bishen on shipment. On the other hand the contention for the appellants is that as the goods were not to be delivered to Mul Chand-Ganga Bishen until they were paid for the property in the goods, which were not ascertained at the time of the contract, did not pass till payment was made to the Bank by Chiman Ram-Badri Narain on the 25th January 1921. We think this contention is correct. It was held by Cotton L. J. in *Mirabita* v. *Imperial Ottoman Bank* (1) (referred to on page 377 of

(1) (1878) 3 Ex. D. 164.

Benjamin's Sale of Personal Property, Fifth Edition) that when the seller deals with, or claims to retain, the bill of lading in order to secure the price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the former is not to be delivered to the buyer till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the buyer. The same rule is given on page 206 of Remfrey's Sale of Goods in British India, and in a recent judgment of the Bombay High Court *Ford Automobiles, Limited*, v. *Delhi Motor Engineering Company* (1), it is mentioned as a well established rule.

But even though the property in the goods did not pass to Mul Chand-Ganga Bishen or their indentors till January 1921 this fact does not relieve the defendants from liability. The appropriation of the goods to the contract, which was at first conditional, became final when payment was made, and if it was assented to by the defendants the sale to them became complete and the property in the goods passed. In that case the suit for the price of the goods is maintainable, and we cannot accede to Mr. Tek Chand's contention that because the plaintiffs had not become the owners of the goods at the time when they made their contract with the defendants their only remedy is to sue for damages for breach of contract.

Now the invoices and the shipment patterns were sent by Mul Chand-Ganga Bishen to Chiman Ram-Badri Narain, who forwarded them to the plaintiffs, who in turn forwarded them to the defendants. The plaintiffs wrote to the defendants on the 30th September 1920, asking them to pay for the goods, and the defendants on the 8th October sent the following reply (P. 2) :-

"In reply to yours, dated 30th September 1920, we are sorry that as the exchange rate in these days is in great disorder we can't pay and take delivery of the above goods. If you will pay on our behalf we shall not be liable for that. We will pay at once as soon as the exchange will be in order."

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The plaintiffs wrote again to the defendants on the 16th November asking them to take up the goods, but apparently received no reply. They wrote again on the 15th January 1921, informing them that if they did not retire the drafts by the 17th the drafts would be retired on the defendants' account and risk. The drafts were retired by Chiman Ram-Badri Narain on the 25th January 1921, as already stated, and on the 29th January a Notary Public, named Sham Bihari Lal (P. W. 3), went on behalf of the plaintiffs to the defendants' shop and tendered delivery orders for the goods. Ganeshi Lal, a member of the defendants' firm, who was at the shop, would not take the delivery orders, but said a reply would be sent in two or three days after he had consulted his father. No reply, however, was sent, and it was not till the plaintiffs' *Vakil* wrote a letter on the 2nd February calling upon the defendants to pay for the goods that the defendants' *Vakil* wrote a week later repudiating all liability. We think it is clear that the defendants signified their assent to the appropriation of the goods to the contract, first by their letter of the 8th October 1920, in which they pleaded only the unfavourable exchange as a reason for not taking up the goods, again by their silence on the receipt of the plaintiffs' letters of the 16th November 1920 and the 15th January 1921, and lastly by not having signified their dissent within a reasonable time after the delivery orders had been tendered to them on the 29th January 1921.

It is next contended that the goods offered are not according to the contract. The goods ordered were of qualities Nos. 432, 436 and 440. It does not appear that the goods supplied were not of the qualities ordered, but by an arrangement between the shippers and the importers the goods, instead of being stamped with the Nos. 432, 436 and 440 as stipulated in the importers' confirmatory indents of the 3rd December 1919, were stamped with the Nos. 1432, 1440 and 1436, respectively. The defendants contend that on account of this variation they were entitled to reject the goods. The contention is supported by *Moore & Co., Limited* v. *Landauer & Co.* (1), and if the defendants when asked to take up the goods had refused on the ground of

(1) (1921) 2. K. B. 519.

variation from the terms of the indent, they would have had a good case. But although the Nos. 1432, 1440 and 1436 were mentioned in the invoices sent to the defendants the latter never took any objection to the goods, and from their letter P. 2 to which we have referred above, as well as from the fact of their not replying to the plaintiffs' subsequent letters asking them to take up the goods, it is only reasonable to conclude that they waived any objections which they might have taken. The suit is not barred by the Specific Relief Act as is contended in the 9th ground of appeal, and we would hold, therefore, that the defendants are liable for the price of the goods.

The only other matter for consideration is the rate at which interest should be charged. The decretal amount includes interest at 8 *per cent. per annum*, and it is contended that the interest should not exceed 6 *per cent.*, which is the rate mentioned in the third clause of the importers' indent. That clause, however, relates only to what would be payable on account of loss incurred on resale. Eight *per cent. per annum* is the rate of interest charged by the Bank, and we see no reason why the defendants should not be required to pay interest at that rate. Ten annas *per cent. per mensem* is also not an excessive rate to allow for interest on the decretal amount.

We would therefore dismiss the appeal with costs.

A. N. C.

Appeal dismissed.