APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Fforde.

JHANDOO MAL-JAGAN NATH (PLAINTIFFS) Appellants,

versus

PHUL CHAND-FATEH CHAND (DEFENDANTS) Respondents.

1924

May 3.

Civil Appeal No. 1559 of 1921.

Indian Contract Act, IX of 1872, section 39—Repudiation of a contract by one party before the time for its performance arrives—Anticipatory breach—when the other party may terminate the contract by acquiescing in such repudiation.

There was an agreement between the plaintiffs and defendants for the purchase and sale of certain goods deliverable upon their arrival from England on certain dates. Before the dates in question the plaintiffs repudiated the bargain and the defendants, after having refused to accept this repudiation, finding that the attitude of the plaintiffs was unalterable, decided to acquiesce in it and informed the plaintiffs accordingly. The plaintiffs then turned round and insisted upon the delivery of the goods, and as their request was not complied with brought the present suit for damages.

Held, that in the present case there was a distinct and unequivocal refusal by the plaintiffs to perform their contract in its entirety, and so long as the defendants were continuing to urge or demand compliance with the contract, it could not be said to have been terminated; but when the defendants, finding that the plaintiffs' attitude was unalterable, decided to acquiesce in it, and communicated such acquiescence to the plaintiffs, the contract between the parties was put an end to and the plaintiffs' suit was therefore rightly dismissed.

British and Beningtons, Ld. v. *N. W. Cachar Tea Co.* (1), per Lord Sumner, *Bradley* v. *H. Newsom, Sons and Coy.* (2), per Lord Wrenbury, *Hochester* v. *De La Tour* (3), per Lord Campbell, *Ripley* v. *M'Clure* (4), *Frost* v. *Knight* (5),

(1) (1923) L. R. A. C. Part I, p. 48. (3) 2 E. & B. 678.
(2) (1919) L. R. A. C. (16), pp. 51-54. (4) (1849) 4 Ex. 345 and S. C. 18 L. J. 419.
(5) (1872) L. R. 7 Ex. 111.

1924

JHANDOO MAL-JAGAN NATH v. PHUL CHAND-FATEH CHAND.

Johnstone v. *Milling* (1), *Michael* v. *Hart & Co.* (2), and *Hart & Co.* v. *Michael* (3), referred to.

First appeal from the decree of Diwan *Som Nath, Senior Subordinate Judge, Delhi, dated the 30th March 1921, dismissing the plaintiffs' suit.*

SARDHA RAM, for Appellants.

TEK CHAND and M. L. PURI, for Respondents.

The judgment of the Court was delivered by—

FFORDE J.—This is an appeal from a decree of the Senior Subordinate Judge of Delhi dismissing the plaintiffs' suit brought for damages for non-delivery of goods.

By a contract entered into in the month of December, 1916, the plaintiffs agreed to buy and the defendants to sell 50 cases of white shirting of the office of Messrs. R. J. Wood and Co., the goods to be of the shipments of May 1917 to October 1917 or June 1917 to November 1917. The actual terms of the contract are not material to the question which we have to decide, and therefore it is not necessary to refer to them in detail. It is admitted now by both parties that a valid and binding contract was entered into between them on the date in question, and the first question to be decided is whether that contract was put an end to before the arrival of the time fixed for performance. The attitude of the parties to the contract is shown by the correspondence which passed between them from the 28th of April to the 10th of July. On the 28th of April the defendants (the sellers) wrote to the plaintiffs (the buyers) that the goods in question would have to be shipped in bales instead of in cases. To this the plaintiffs replied that they refused to agree to this change, and stated that if the goods were not

(1) (1886) 16 Q. B. D. 460. (2) (1902) 1 K. B. 482.
(3) 89 L. T. 422.

1924

JHANDOO MAL-JAGAN NATH v. PHUL CHAND-FATEH CHAND

shipped in cases they would cancel the contract. To this the defendants replied that it was impossible to send the goods otherwise than in bales, as the British Government had prohibited the import of wood and tin for India on account of the scarcity of these materials. On the 1st of May the plaintiffs wrote two letters, in the first of which they stated that as they had not received the acceptance for the goods (meaning the acceptance by Messrs. R. J. Wood and Co.), the contract had been cancelled. In their second letter of the same date the plaintiffs referred to the defendants' letter of the 30th of April in the following terms :—

" We beg to say that we do not agree with your view and we have already cancelled the goods and confirm it again, which kindly take note once for all and oblige. "

To these two letters defendants replied on the same date, objecting to the cancellation of the contract and suggesting that the plaintiffs were raising futile objections in order to evade their obligations owing to the fact that the price of the goods had fallen in the market. The correspondence continued on these lines, the plaintiffs repudiating the contract on various pretexts and the defendants refusing to accept such repudiation. On the 19th of May the plaintiffs wrote the following letter to the defendants :—

" With reference to your letter of date, we beg to say that the goods in question has (*sic*!) already been cancelled and we have written you so often that it is unnecessary to repeat it again. "

To this the defendants replied on the 21st of May, refusing to admit the plaintiffs' right to cancel the contract and insisting upon their liability to take delivery in accordance with its terms. No further correspondence took place between the parties until

1924

JHANDOO MAL-JAGAN NATH v. PHUL CHAND-FATEH CHAND.

the 10th of July 1917 when the defendants wrote to the plaintiffs as follows :—

" Please note that we accept yours of the 19th of May 1917. "

To this letter no answer appears on the record before us, but it is admitted by counsel on both sides that the plaintiffs wrote a letter on the 19th of July which reads as follows :—

" With reference to your letter of the 10th instant, we beg to say that we are quite surprised to note the contents contained in your letter. We do not know how you now cancel the goods for which kindly refer to your letter of the 21st of May with us. So please note that you are bound to give us goods on arrival, and the same cannot be cancelled which note once for all and oblige."

Now it is quite clear from the correspondence, and from the evidence on the record, that from April to July the 19th, the plaintiffs had definitely and unequivocally refused to be bound by their contract, and had expressed an unalterable determination not to take delivery of the goods in question. On the 4th of May they had written to say that they had cancelled the goods, and protested against any further correspondence on the subject. On the 11th they again wrote stating that the contract was cancelled ; and on the 19th they reiterated their repudiation, referring to their previous letters of the 4th and 11th and pointing out that it was unnecessary to again repeat that the contract must be regarded as cancelled. In view of this correspondence and the evidence on the record, I am satisfied that up to the 19th of July there was a continuing repudiation by the plaintiffs of the entire contract. Up to that date they had said in terms : " The contract between us is at an end. Under no circumstances will we take delivery of the goods.

This is our unalterable determination. Nothing that you say can change our minds, and it is quite futile of you to continue to write to us protesting against our attitude." The defendants on the other hand had been protesting against this repudiation of the contract by the plaintiffs up to the 21st of May. To their letter of that date there was no reply, and, having regard to the plaintiffs' previous letters, the defendants were entitled to regard the ignoring of this letter as a refusal to continue a correspondence which could have no effect upon the plaintiffs' often expressed view that the contract was at an end. A repudiation expressed as in the present case, must be deemed subsisting until it is withdrawn, and until withdrawn the other party to the contract is entitled at any time before the date for performance to say: "As it is obvious that nothing will make you change your mind and accept delivery of the goods when the time comes, I will now accept your repudiation." This is what the defendants did. Finding on the 10th of July that there was no withdrawal by the plaintiffs of the attitude which they had taken up, the defendants notified them on that date that they would acquiesce in the cancellation of the contract, as insisted upon by the plaintiffs' letter of the 19th of May.

I think it clear from the evidence that there has been an anticipatory breach of the contract by the plaintiffs, which gave the defendants a right to treat the contract as having been wrongfully terminated, and to sue if they thought fit for damages for such breach. The defendants did not desire to sue for damages but were content to treat the contract as cancelled. It is quite clear on the authorities that 'anticipatory breach'—that is to say, a breach of the contract before time has arrived for performance—is a matter of intention; and I have no doubt whatsoever

1924

JHANDOO MAL-JAGAN NATH v. PHUL CHAND-FATEH CHAND.

that the defendants' intention up to the 10th of July was to perform their legal obligations; and I am equally satisfied that up to that time at least the intention of the plaintiffs was not to perform theirs. Mr. Sardha Ram for the plaintiffs now says that the reasons given by his clients for challenging the validity of the contract were purely dishonest. He says that they were not sincere in the grounds which they put forward for repudiating the contract. He states, in other words, that the agreement to deliver the goods in question in bales was a substantial compliance with the sellers' obligations, and that the buyers' insistence upon the goods being supplied in cases was merely for the purpose of enabling them to get out of a bargain which it was not in their interest to perform. He now contends that although his clients persistently repudiated the contract on purely dishonest grounds, they are entitled at any time before the date fixed for completion to change their position, to withdraw their repudiation, and to insist upon the contract being performed in its entirety. He argues, quite rightly, that although the repudiation had the effect of an anticipatory breach, yet the contract could not be put an end to prior to the date fixed for completion unless and until the sellers accepted the repudiation and elected to treat the contract as terminated; and he contends that the letters of the plaintiffs up to and including the letter of the 19th of May, constituted an offer to cancel, and that until there was an acceptance of such offer the contract must be deemed to be subsisting. He further says that the reply of the defendants on the 21st of May was a refusal of the offer to terminate, that that definitely put an end to the offer, and that from and after the 21st of May until the 10th of July

both parties must be deemed to be ready and willing to carry out their legal obligations, and that the defendants' letter of the 10th July amounted to an offer from them to terminate the contract, which the plaintiffs refused by their reply of the 19th July.

There is no doubt that if, upon the facts, the parties up to the 10th of July must be regarded as being ready and willing to perform their obligations, the contract must be deemed to have been subsisting at that date ; but I do not think it possible to take such a view on the facts, and I am satisfied that the plaintiffs did not alter their attitude of repudiation until some days after they had received the defendants' letter of the 10th of July definitely accepting such repudiation.

Anticipatory breach, as Lord Sumner pointed out in *British and Beningtons Ld.* v. *N. W. Cachar Tea Co. and Others* (1) is a matter of intention, and there is, also, no doubt that the intention of one party to break the contract must be acted upon by the other party before the contract can be put an end to.

The law on the subject has been very clearly stated by Lord Wrenbury in *Bradley* v. *H. Newsom, Sons and Coy.* (2). After dealing with the various modes in which a contract may be determined, he says "Thirdly, if the one party to the contract, by words or by conduct, expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance, the latter may say, 'I take you at your word; I accept your repudiation of your promise, and will sue you for breach.' This is really no addition to, but a particular appli-

(1) (1923) L. R. A. C. Part I p. 48. (2) (1919) L. R. A. C. (16), pp. 51-54

1924

JHANDOO MAL-JAGAN NATH v. PHUL CHAND-FATEH CHAND.

cation of, the principle first above stated. The first party has, in fact, made an offer. This offer is: 'I am not going to perform the contract. I offer to end it here and now, and to accept the consequences of ending it, those consequences, as I know, being that you can sue me for damages for my refusal.' The other may accept or may decline that offer. If he accepts, then by consensus the contract is determined, but with a right to damages against the party who has refused to perform."

And further in the same judgment he expresses himself as follows:—

"In order to make clear what my view is of the law applicable to such a case I must say something of what is commonly called 'anticipatory breach' of contract. My Lords, the expression is, I think, unfortunate. In *Hochster* v. *De la Tour* (1) the leading case upon this subject, Lord Campbell made no use of the expression in his judgment. It is used several times by Lord Esher in *Johnstone* v. *Milling* (2), but not by either of his colleagues. The words used are, of course, immaterial unless they lead, in course of time, to an erroneous impression. There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promisor, before that time arrives, says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done in the future. He is recalling or repudiating his

(1) 2 E. & B. 678. (2) 16 Q. B. D. 460.

promise, and that is wrongful. His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future. To take Bowen L. J.'s words in *Johnstone* v. *Milling* (1), it is 'a wrongful renunciation of the contractual relation into which he has entered.' It is the third case which I put above. The result is that the other party to the contract has an option either to ignore the repudiation or to avail himself of it. If he does the latter it is still by consensus of the parties, and not by some superior force, that the contract is determined. I cannot see that the doctrine of what is generally called 'anticipatory breach' lends any support to the contention of the respondents in this case. It is no authority for the proposition that anything other than the intention of the contracting parties can either tie or untie the bonds of a contract."

In *Ripley* v. *M'Clure* (2) it was held that if an expression of intention to break a contract remains unretracted when the time arrives for the other party to perform his part of the bargain, this fact will dispense with such performance; and I think it logically follows from this, that so long as the expression of intention remains unretracted the other party may at any time prior to the date fixed for performance acquiesce in the repudiation and by so doing terminate the contract. The gist of these principles of English law laid down in the authorities which I have cited, and in a number of other cases which have been referred to at the bar, amongst which may be mentioned *Frost* v. *Knight* (3), *Johnstone* v. *Miling* (1) and *Michael* v. *Hart & Co.* (4), [affirmed in the House of

(1) (1886) 16 Q. B D. 460, 473.
(2) (1849) 4 Ex 345 and S. C 18 L. J. 419.
(3) (1872) L. R. 7 Ex. 111.
(4) (1902) 1 K. B. 482.

1924

JHANDOO MAL-JAGAN NATH v. PHUL CHAND-FATEH CHAND.

Lords on the facts, *Hart & Co.* v. *Michael* (1)] appears to be embodied in section 39 of the Indian Contract Act, which provides that when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance. There is no doubt that in the present case there was a distinct and unequivocal refusal by the plaintiffs to perform their contract in its entirety, and there is no doubt that so long as the defendants were continuing to urge or demand compliance with the contract it could not be said to have been terminated; but it seems equally clear that when the defendants, finding that the plaintiffs' attitude was unalterable, decided to acquiesce in it, and communicated such acquiescence to the plaintiffs, the contract beween the parties was put an end to. It seems to me that it would be absurd to hold that a party repudiating may at any time up to the date fixed for performance withdraw such repudiation, provided it has not been accepted; but that the other party, who has been urging compliance, may not change his mind when he sees the futility of continuing to protest, and consent to such repudiation. It is not as though the plaintiffs had made one definite offer to put an end to the contract and that offer had been definitely rejected. That is the position which Mr. Sardha Ram asks us to assume existed in the present case. No doubt if a buyer says to a seller "Will you agree to cancel this contract between us?" and the seller replies "No, I insist upon its performance" that is a definite refusal leaving the contractual rights between the parties unaffected. I have no doubt in such a case the seller could not several

(1) 89 L. T. 422.

months afterwards cancel the contract by merely writing to the buyer and saying "I now accept the offer to terminate which you made and which I refused." A communication by the seller of that kind and under those circumstances, would amount to a new offer to terminate coming from him, and would require acceptance by the other side before the contract could be put an end to, but in the present case the buyer has not merely offered to cancel a contract, but has definitely expressed an unalterable resolve to refuse to perform it. It seems to me perfectly reasonable that the seller, after making every effort to induce the buyer to change his mind and finding such efforts to be in vain, may turn round and say "Very well, as I see it is hopeless trying to persuade you to carry out your obligations, I will accept your repudiation."

Mr. Tek Chand for the defendants has raised an alternative defence to the action. He argues that as the supply of the goods in cases was a material term of the contract, and as the contract in that form became impossible of performance owing to the action of the Government in prohibiting the export of cases, the defendants were absolved from performance. He relies upon the second paragraph of section 56 of the Contract Act which provides that a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the Act becomes impossible or unlawful. Mr. Tek Chand's argument is that the contract to supply the goods in cases became impossible after the contract was made by reason of the Government's prohibition, and that, therefore, the contract itself became void as soon as this event—that is to say, the prohibition by

1924

JHANDOO MAL-JAGAN NATH v. PHUL CHAND-FATEH CHAND,

the Government—came into existence. He points out that the plaintiffs themselves repeatedly declared that delivery in cases was an essential condition of the contract, and that unless the goods were so delivered the plaintiffs would not accept them. It is admitted that at the time fixed by the contract for delivery the Government prohibition was still in force, and that, accordingly, at that time the contract was impossible of performance and was voided by the terms of section 56 of the Contract Act.

In view, however, of the conclusion which I have arrived at upon the facts of this case, which is in agreement with the findings of fact of the trial Court, namely, that the parties by consent terminated the contract on the 10th of July, 1917, I do not think it necessary to decide Mr. Tek Chand's second point.

Agreeing as I do with the findings of the trial Judge, I am of opinion that this appeal should be dismissed with costs.

SCOTT-SMITH J.—I concur.

A. R.

Appeal dismissed.