APPELLATE CIVIL.

Before Mr. Justice Harrison and Mr. Justice Agha Haidar.

1927

Jan. 5.

PHUL CHAND-FATEH CHAND (DEFENDANTS) Appellants.

versus

JUGAL KISHORE-GULAB SINGH (PLAINTIFFS) Respondents.

Civil Appeal No. 1782 of 1922

Indian Contract Act, IX of 1872, sections 39, 97, 107—Sale of goods—per shipment—arrival of—by consignments—effect of—Different shipments—tender of goods made up of—contrasted—Section 39—Breach of contract by imposing conditions—resilement from—effect of—prior to expiry of time for performance—Waiver of breach—what constitutes—effect of—Section 94—delivery on payment—demand for—place of—Section 107—Re-sale—delay—pleading—necessity for definite allegation—Sale—adjournment of—without further advertisement—validity of.

The defendant (of Delhi) contracted to buy a specified shipment of piece-goods and to take delivery and make payment on arrival of the same in Delhi. In due course the plaintiff-vendor notified the arrival of the goods and, although he first refused to give delivery except upon certain conditions, he shortly afterwards (in the absence of any action by the defendants) withdrew those conditions, demanded performance of the contract, and instructed his Bankers at Delhi (with whom the goods lay) to give delivery against payment of the price. The defendant wrote requesting that the goods should be sent, but as that request was not accompanied by money, the plaintiff finally resold the goods and sued for the difference between the contract price and that obtained on re-sale. This portion of the suit was contested on appeal on the ground that the plaintiff's notice and invoices referred to the shipment as having arrived in Delhi in two lots instead of one. It was also urged that the plaintiff by his conditional refusal had debarred himself for all time from performing or demanding performance of the contract. The plaintiff further

1927

PHUL CHAND-FATEH CHAND v. JUGAL KISHORE-GULAB SINGH.

contracted on the same terms (as above) to sell 8 bales to be shipped in July, but actually tendered 6 bales of the July shipment together with 2 bales of an August shipment. The defendant's refusal to take delivery in this case was based only upon an alleged shortage in the number of pieces. The plaintiff pleaded therefore that the defendant had waived his right to object to the irregularity in shipment.

Held, that the contract contemplated the arrival of each particular shipment piece-meal *or* in one lot, just as the shippers and the Railway Company might be able to deal with it, and a mere interval of two days between the arrival in Delhi of the consignments making up the shipment so notified, did not constitute a breach of the contract.

Rattan Lal-Sardari Mal v. *Goverdhan Das-Ram Gopal*, Civil Appeal No. 2684 of 1922 (unpublished), distinguished.

Held further, that section 39 of the Indian Contract Act not only covers and includes anticipatory breaches of contract but applies to all breaches which occur up to the expiry of the last date on which a contract can be performed in whole or in part.

Thus, even if the letter containing the conditions imposed by the plaintiff were treated as an absolute refusal to deliver, the defendant having taken no action after receipt of that letter to put an end to the contract, it was open to the plaintiff to resile from the position and to demand performance of the contract prior to the expiry of a reasonable time for delivery.

And, moreover, that by virtue of section 93 of the Act, before the defendant could challenge the conduct of the plaintiff who was ready to deliver) it was for him, the defendant, to show that he performed his part of the contract by making a proper and sufficient demand, accompanied by the necessary sum of money, for the goods to be made over to him at the seller's place of business, and not at his own.

Held also, that an objection to the re-sale under section 107 of the Act on the ground that it was belated, could not be entertained on appeal unless the allegation that the sale took place after the expiry of reasonable time, had been definitely pleaded.

1927

PHUL CHAND-FATEH CHAND v. JUGAL KISHORE-GULAB SINGH.

And, the mere fact that the auction, after being advertised for one day, was continued without further proclamation on subsequent days in the hope of securing a better price, did not invalidate it.

Held however, (with regard to the July and August shipments) that the tender of a portion of the goods of a different shipment from that contracted for rendered it impossible for the plaintiff to succeed in his suit in respect of that portion of the contract, for, even if the defendant were held to have waived his right to object to that particular irregularity, it would still have been for the plaintiff to show that the goods sold by him at the time of the re-sale were the actual goods, by tender of which he had performed his part of the contract.

Parthasarathy Chetty & Co. v. *Gajapathy Naidu & Co.* (1), followed.

Nannier v. *Rayalu Iyer* (2), and *Gulab Rai-Sagar Mal* v. *Nirbhe Ram-Nagar Mal* (3), referred to.

First appeal from the decree of Diwan *Som Nath, Senior Subordinate Judge, Delhi, dated the 26th June 1922, directing the defendant to pay to the plaintiffs the sum of Rs. 11,651-10-0.*

TEK CHAND, M. L. PURI and HEM RAJ, for Appellants.

SARDHA RAM, G. S. SALARIYA and BISHAN NARAIN, for Respondents.

The judgment of the Court was delivered by—

HARRISON J.—The firm of Jugal Kishore-Gulab Singh sued the firm of Phul Chand-Fateh Chand for a sum of Rs. 18,533 being the difference between the price actually realised for 25 bales of piece-goods when sold in February 1919 and June 1919 and the contract price. The goods in question were to have been of

(1) (1925) I. L. R. 48 Mad. 787. (2) (1926) I. L. R. 49 Mad. 781.
(3) (1923) I. L. R. 4 Lah. 423.

1927

PHUL CHAND-FATEH CHAND v. JUGAL KISHORE-GULAB SINGH.

three shipments. May, June and July ; 9 bales of May, 8 of June and 8 of July, and the plaintiff succeeded in proving his case so far as the May and June shipments were concerned, but failed as regards July it being found that there was a fatal defect in his case so far as this shipment was concerned, in that instead of his having offered 8 bales of July shipment he offered 6 of July and 2 of August. A decree was therefore given for Rs. 11,651-10-0. Against this the defendant firm appeals and the plaintiff firm presents cross-objections regarding the balance of their claim.

The facts of the case are simple enough. The contract is clear. The defendant was bound to take delivery and make payment as soon as he was informed of the arrival of the goods and the plaintiff on the other hand, was under the contemporaneous obligation of accepting the money and delivering the goods. On the 25th and 27th of September the plaintiff advised the defendant that the goods of the May shipment had arrived in Delhi. On the 30th of September 1918 the plaintiff wrote again calling upon the defendant to take up the goods against payment within ten days and stating that if he failed to do so, he would dispose of the goods. In answer to this the defendant wrote a letter on the 1st October 1918 alleging that he had sent his man several times to ask for delivery of the goods but without success and that " at last they had advised their bankers Messrs. King King and Co. to take delivery of the 9 bales of Muslin on payment to you of the price thereof in full settlement. Therefore (the letter continues), please receive your money in full on account of the 9 bales of muslin from Messrs. King King and Co., and deliver the goods and the papers relating to costs to them

within three days. If you fail to do so, you shall be liable for any loss that will be suffered by us as also by our customers. Please note this". In answer to this a letter was written on the 3rd of October 1918 in the following terms :—" In reply to your notice, dated 1st instant, regarding 9 packages of mulls, we have to inform you that until you give us the delivery of the above goods (*i.e.*, two bales described in the heading) your notice cannot be accepted in any case; please note."

In the interval a letter dated 2nd October 1918 was written by Messrs. King, King and Co. to the plaintiff which ran as follows. " We have received instructions from Messrs. Phul Chand, Fateh Chand to pay for the above draft *plus* Rs. 2,475 as profit at Rs. 1-6-0 per piece. Kindly send us the goods and memo. and receive the money." No money was sent. To this the plaintiff did not reply and on the 10th of October he wrote again to the defendant calling upon him to take delivery :—

" We are ever ready to deliver the goods. Messrs. King, King and Co. sent us a letter only but not the money, hence please either send the money yourself or King, King and Co., and take the goods.

Regarding original invoice please note you can see same at our shop."

The goods were sold in February and the question to be decided is whether the plaintiff was justified in acting as he did.

It is urged on appeal by Mr. Tek Chand that the contract was broken by the plaintiff, and that the defendant was in no way bound to do his part after receipt of the letter dated the 3rd of October 1918.

1927

PHUL CHAND-FATEH CHAND v. JUGAL KISHORE-GULAB SINGH.

He contends that section 39 of the Indian Contract Act does not apply to the case, and that it is sufficient for him to show that the plaintiff was not willing and ready on one particular occasion to deliver the goods and, if this is established, his obligations ceased. He also takes exception to the invoices sent to him by the plaintiff, in that they referred to the consignment in two lots. He states that because a contract must be performed in its entirety, a man who has undertaken to deliver 9 bales of a certain shipment is bound to give notice of the arrival of the total number of bales which constitute the shipment at one time and that if he writes, as the plaintiff did in this case, to intimate the separate arrivals of the two portions which made up the whole he has committed a breach which entitles the buyer to disclaim all sort of liability under the contract and that he can take the objection for the first time five years after the due date. Further he contends that if the plaintiff was justified in reselling the goods, the sale was belated, that the plaintiff has wholly failed to show that it was conducted within reasonable time and that therefore at the worst, he, the buyer, can only be liable to pay damages. Such is the case regarding the May shipment.

As regards the June shipment the same points are urged with this exception that Messrs. King, King and Co., do not come into the correspondence and that on receiving a notice, dated the 2nd of December, from the plaintiff the defendant wrote as follows on the 7th of December: "We came to know that these goods have arrived since long and you give its arrival information now, hence we are not responsible for these goods owing to your negligence, which please note." To this the plaintiff replied that as a matter of fact they had made a mistake and the goods had

1927

PHUL CHAND-FATEH CHAND v. JUGAL KISHORE-GULAB SINGH.

not arrived at all. On the 11th of February he wrote saying that they had come and the defendants must take delivery, to which the defendants replied on the 11th of March to the effect that the arrival notice was not given at a proper time and for this and other reasons they were not responsible. These goods were auctioned in the month of June.

We take first the question of whether the notice given by the plaintiff was sufficient and legal. The terms of the contract which are at page 59 of the printed paper-book contain the following sentence: "We shall receive invoice and pattern and take delivery of the goods as soon as we are informed of their arrival." Counsel relies on an unprinted ruling of this Court, being No. 2684 of 1922, which he says is precisely the converse case. The facts are in our opinion quite different, for there it was a question of the goods having arrived in one shipment, the contract having been for two, and naturally it was held that the buyer was not liable and that he was entitled to receive goods in accordance with the terms of his contract. In our opinion the actual wording of this contract contemplates the arrival of the goods piece-meal or in one lot just as the shippers and the Railway Company might be able to deal with them, and the fact that there was a two days' interval and that the plaintiff informed his buyer as soon as these consignments arrived did not in our opinion constitute any sort of breach of the conditions inasmuch as he did receive the notice of the arrival of the whole of the consignment, which was of the correct shipment.

It is contended that, however long the interval, the seller should have waited until all the goods had arrived rendering his buyer liable for godown rent in the interval in accordance with the terms of the con-

1927

PHUL CHAND-KATEH CHAND v. JUGAL KISHORE-GULAB SINGH.

tract and should have intimated the arrival of the goods as soon as they were complete and not before. There is, in our opinion no force in this contention though the buyer would doubtless have been entitled to hold his hand and take no action until and unless the whole of the consignment had arrived and he was told of its arrival: provided always the goods were actually shipped in May, it is wholly immaterial whether they were on board one, two or nine ships and came up from Bombay in one or several trains.

The second and the most important point is whether the plaintiff was or was not ready and willing to perform the contract; in other words, had he control over the necessary goods and was he prepared to give delivery on the buyer performing his part of the contract. There was previously litigation between the seller and his own seller, and it is quite clear and is not disputed that the goods were in existence and lying in the custody of the bank to be delivered on payment being tendered. That being so, it is clear that the plaintiff was ready and willing unless it be held that his letter of the 3rd of October in some way debarred him from exercising his control over the goods. The first thing to be seen is what was the due date. The plaintiff himself had called upon the defendant to take delivery before the 10th of October. The defendant wrote saying that he had deposited the necessary money with Messrs. King, King and Co. The plaintiff refused to give delivery except on certain conditions but subsequently on the 10th October resiled from this position and called upon the buyer to perform. It is contended by Mr. Tek Chand that once the plaintiff had written this conditional refusal he had debarred himelf for all time from performing or demanding performance of the contract. He does

not rely upon section 39 of the Contract Act and contends that the contract had actually come to an end, and there could be no question of delivery at any later date. In our opinion this is a wholly impossible position, and even though the plaintiff was not willing on that particular date—the 3rd of October—to give delivery except on conditions, which he was not justified in making, the due date had not expired and he was quite within his rights in demanding performance within a reasonable time. Even if the most extreme view be taken of this letter of the 3rd October, and it be treated as an absolute refusal, the position would in our opinion be governed by the terms of section 39. There is much misunderstanding and much loose argument based on the unfortunate fact that the word "anticipatory" has somehow been associated with the section, and it is often said that the section only refers to anticipatory breaches in the sense of breaches which occur before due date. The word anticipatory nowhere occurs in the section and the very wording of the section and the illustration thereunder make it clear that it applies to all such breaches which occur before the expiry of the last date on which the contract can be performed in whole or in part though it also covers and includes all earlier breaches. The defendant admittedly took no action on receipt of the letter of the 3rd of October. It was therefore open to the plaintiff to change his mind and to offer to deliver the goods unconditionally before the expiry of the due date, and this he did.

Further before the defendant can challenge the conduct of the plaintiff it is for him to show that he performed his part of the contract and made a proper and sufficient demand accompanied by the necessary sum of money, for the facts of this case show that the goods were lying in the custody of the Alliance Bank

1927

PHUL CHAND-FATEH CHAND v. JUGAL KISHORE-GULAB SINGH.

and could not be withdrawn until a certain draft was cleared by payment of money. It was therefore absolutely essential that money should accompany the demand. It was also necessary under section 94 of the Contract Act that the buyer should ask to have the goods made over to him at the seller's place of business and not at his own. There were therefore two fatal defects in the so-called demand, for Messrs. King, King and Co. asked to have the goods sent and further to have them sent without any money being paid.

This brings us to the question of whether the resale was defective. It is contended by Mr. Tek Chand that it never took place, that there was no real sale in the sense that there was no real purchaser, that there was a fatal flaw in the proceedings in that the sale having been advertised for one day was twice continued on subsequent days without notice or proclamation and finally that the sale was wholly bad as being belated

In the pleas the sale was objected to as "fictitious, unwarranted and illegal." There is no definite plea that it took place after the expiry of reasonable time. Mr. Tek Chand contends that the word "illegal" covers all possible defects, and that the burden lay heavily upon the plaintiff to prove that all the conditions precedent as required by section 107 of the Indian Contract Act were fulfilled. On the other hand, it is urged, and we think with greater force, that it is wholly impossible for any man to meet a plea of this sort until it is made, that the question of reasonable time is one of fact depending upon the peculiar circumstances of the case, that had the plea been taken the plaintiff would have had

to produce such evidence as would have satisfied the Court that the delay was not unreasonable and that the failure to take the plea is fatal to the defendant's case. The objection to the resale on the ground of its being fictitious appears to us to be entirely frivolous. Witnesses were produced with their books to show that they purchased some of the bales and objections were taken to them *seriatim* according to their position in life. The partners in the firm were objected to as not being *munims* and the *munims* as not being partners, and it was pointed out that both were unable from their own knowledge to prove both the sale and the entries in support of it. The objection regarding the adjournment is also in our opinion quite immaterial, for the buyer could in no way be injured by such adjournment. The auction took place on the advertised date, and in the hope of getting a better price the auctioneer went on and did more work than he need have done. The bids on the later days were precisely the same and a higher price could not be realised.

Regarding the June shipment there is no point which is not common to the May shipment except that of the date of the bill of lading. This was raised in this Court by Mr. Tek Chand, but counsel for the plaintiff was able to dispose of it by showing us on the record a copy of one of the original portions of the bill of lading which is made out in triplicate (Ex. P-39). The same objections were taken regarding the resale and counsel further contended that the great delay in the arrival of this shipment proves that it cannot have been a June shipment at all. This objection in our opinion is disposed of by the bill of lading itself, and it is noticeable that this objection was not taken at any stage of the case until to-day.

1927

PHUL CHAND-FATEH CHAND v. JUGAL KISHORE-GULAB SINGH.

The cross-objections of the plaintiff deal with the July shipment, the claim regarding which has been disallowed because instead of tendering 8 bales of this shipment the plaintiff tendered 6 of the July shipment together with two of August. The Subordinate Judge has held that this is a fatal flaw and has dismissed his case so far as it relates to this shipment. The invoices are to be found at pages 41 and 42, the first describing the six bales of the July shipment and the latter the two bales of the August. To this invoice the defendant objected in a letter of the 9th October 1918, in which he took exception to the fact that there was a difference in pieces according to the contract terms meaning that the last bale No. 25 of the August shipment was 37 pieces short. To this the plaintiff replied on 14-10-18:—"In reply to yours dated the 9th instant we have to bring to your notice that no number of pieces are entered in the contract and besides this there are 8 cases in our one shipment of 18—25 and the total number of pieces in the above 8 cases are correct." This letter was apparently based on a note Exhibit P-75 made on the letter to which it was a reply:—"No detail of pieces, etc., is given in our contract. One chalan comprises 8 cases No. 18 to 25. Please check and examine the pieces contained in all the 8 cases. They are all right". Counsel now contends that as the bill of lading, which was quoted in the second notice showed that the shipment was of August and the buyer took no exception to this irregularity, he must be taken to have waived his right to object and this more especially as he did take exception to the shortage. He relies on *Nannier* v. *Rayalu Iyer* (1) and *Gulab Rai-Sagar Mal* v. *Nirbhe Ram-Nagar Mal* (2), but the correspondence read as a

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while does not in our opinion support the plaintiff's contention. In his later letter he spoke himself of one shipment, when admittedly there were two of different months, and now interprets this as meaning "the two shipments which were converted into one by your kindly overlooking the irregularity, regarding the second shipment." This is quite impossible, and we think it clear that the buyer who wished to get out of the bargain overlooked the date which does appear on the invoice but not against any words indicating that it is the date of the bill of lading though doubtless in commercial circles this is understood. The point which he did notice and apparently thought was a good ground for putting an end to the transaction was that of shortage, and in our opinion the facts are not sufficiently similar to those contained in the two rulings to make them applicable, and while reading *Nannier* v. *Rayalu Iyer* (1) it is necessary to bear in mind that it is in continuation of and does not dissent in any way from *Parthasarathy Chetty & Co.* v. *Gajapathy Naidu & Co.* (2). Further, even if it were possible to hold that there had been a complete waiver it would still be for the plaintiff to show that the goods sold by him at the time of the resale were the actual goods, by tendering which he performed his contract. No tender of August goods was sufficient and valid, and there is no getting away from the fact that the goods sold were not in their entirety those contracted for, and therefore in a suit of this nature it is wholly impossible for the plaintiff to succeed.

The result therefore is that both the appeal and the cross-objections must be dismissed with costs.

N. F. E.

Appeal dismissed.

(1) (1926) I. L. R. 49 Mad. 781. (2) (1925) I. L. R. 48 Mad. 787.