APPELLATE CIVIL.

Before Sir Shadi Lal, Chief Justice, and Mr. Justice Agha Haidar.

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Nov. 13.

KIDAR NATH-BEHARI LAL (DEFENDANTS), Appellants

versus

SHIMBHU NATH-NANDU MAL (PLAINTIFFS), Respondents.

Civil Appeal No. 1812 of 1922.

Indian Contract Act, IX of 1872, section 51—Non-delivery of goods—Buyer—"ready and willing"—whether necessary to prove tender of price—Damages—measure of—where time for delivery extended.

The defendants contracted to sell certain goods but failed to notify the plaintiffs (as agreed) of the arrival of the goods, and although the plaintiffs accepted their request for a postponement of delivery, the defendants were subsequently unable to perform their part of the contract, never having got possession of the goods themselves. The market was meanwhile rising and the plaintiffs had entered into a contract to sell the goods to another firm who were capable of paying the price in cash on delivery. The defendants finally repudiated the contract and pleaded that the plaintiffs could not maintain an action for damages without proving that they were ready and willing to perform their part of the contract.

Held, that it was not necessary, for the purposes of section 51 of the Indian Contract Act, for the plaintiffs to prove that they actually tendered the price.

Held further, that the damages should be calculated with reference to the last date, if any, to which the contract was extended, or, to the date on which the contract was finally broken, namely, by the defendants' repudiation.

Ogle v. *Earl Vane* (1), and *Hickman* v. *Haynes* (2) followed.

(1) (1867) L. R. 2 Q. B. 275. (2) (1875) L. R. 10 C. P. 598.

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First appeal from the decree of Bhagat *Jagan Nath, Subordinate Judge, 1st class, Delhi, dated the 31st May 1922, directing the defendants to pay to the plaintiffs the sum of Rs. 3,196-14-0.*

SARDA RAM and SHAMAIR CHAND, for Appellants.

TEK CHAND, GOPAL CHAND and HEM RAJ, for Respondents.

The judgment of the Court was delivered by—

SIR SHADI LAL C. J.—The parties to this appeal are two mercantile firms doing business in the city of Delhi. On the 24th of November, 1916, the defendants Kidar Nath-Behari Lal, contracted to sell to the plaintiffs, Shimbu Nath-Nandu Mal, 25 cases of muslin at a price specified in the bought and sold notes executed on that date. The goods were to be imported from England by a firm of commission agents in pursuance of an order placed with them by Nathu Mal-Miri Mal who, it is alleged, had promised to deliver the consignment to the defendants. It appears that the goods arrived in Delhi in July and August 1917, but that Nathu Mal-Miri Mal did not deliver them to the defendants, with the result that the latter, after some correspondence with the plaintiffs, repudiated the contract.

The plaintiffs thereupon raised an action for the recovery of damages arising from the breach of the contract and have obtained from the trial Court a decree for Rs. 3,196-14-0. Against this decree the defendants have brought the present appeal, and Mr. Sardha Ram for the appellants has expressly abandoned the plea that their liability to deliver the goods to the plaintiffs was contingent upon the performance of the contract made by them with Nathu Mal-Miri Mal.

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It is to be observed that the contract between the parties did not expressly mention any date for the delivery of the goods, but the learned counsel on both sides are agreed that the delivery was to be made soon after the arrival of the goods in Delhi. Now, the evidence on the record shows that 17 cases of muslin arrived on the 10th of July, 1917, and that the remaining 8 cases reached Delhi about the third week of August. It was obviously the duty of the sellers to inform the buyers of the arrival of the goods, but it appears that the former gave no such information to the latter, and after a protracted correspondence in which they promised to deliver the goods after receiving them from Nathu Mal-Miri Mal they finally refused to perform the contract.

The learned counsel for the appellants, while conceding that his clients were not in a position to deliver the goods, urges that the plaintiffs cannot maintain an action for damages without proving that they were ready and willing to perform their part of the contract. In support of his contention he places his reliance upon section 51 of the Indian Contract Act which provides that "when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise." There is, however, ample authority for the proposition that, in order to prove that a buyer was ready and willing to perform his part of the agreement, it is not necessary for him to show that he actually made a tender of the price. Considering that the market was rising and that the defendants did not possess the goods which they had contracted to sell, it would have been an act of supererogation on the part of the buyers if they had taken the money to the defendants'

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shop and made an actual tender thereof. The evidence on the record shows that the plaintiffs had entered into a contract for the sale of the goods to another merchant Ram Sarup, and that the latter had sufficient cash at his disposal and could easily pay for the goods on delivery. We are satisfied that the non-completion of the contract was not the fault of the plaintiffs, and that they were willing and able to complete it if it had not been renounced by the defendants. It must, therefore, be held that the defendants broke the contract.

The measure of damages is admittedly the difference between the contract price and the market price on the date of the breach. What was the date of the breach in the present case? As pointed out above, no date for the delivery of the goods was fixed in the contract, but the parties intended that delivery should be made within a reasonable time after the arrival of the goods in Delhi, and that the sellers should give intimation thereof to the buyers. The sellers, however, did not notify the buyers of the arrival of the goods, but on the other hand they wrote to them from time to time that they would deliver the goods on receipt thereof from the firm who in turn had entered into a contract of sale with them, and finally repudiated the contract on the 27th of August, 1917, so far as 17 cases were concerned, and on or about the 19th of March, 1918, in respect of the remaining 8 cases. It appears from the documentary evidence that there was in effect a request by the sellers to postpone the time for performing the contract, and that this request was accepted by the buyers.

Now, the rule enunciated in *Ogle* v. *Earl Vane* (1), and subsequently affirmed in several cases (*vide*,

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inter alia, *Hickman* v. *Haynes* (1), is to the effect that where the time for performing a contract of sale has been postponed at the request either of the vendor or the purchaser, and the contract is ultimately broken, this has the effect of deferring the period at which the breach takes place. In such cases, damages are to be calculated with reference to the last date, if any, to which the contract was extended, or to the date on which the contract was finally broken. As stated above, the defendants must be deemed to have broken the contract on the 27th August, 1917, and 19th March, 1918.

The trial Judge has, after considering the evidence produced by the parties, determined the market price of muslin on the aforesaid dates, and calculated the amount of damages which the plaintiffs are entitled to recover from the defendants. The finding recorded by him on this point has been impugned by the appellants as well as by the respondents who have preferred cross-objections, but we are not prepared to hold that the decision of the learned Judge is wrong or that there is any adequate ground for remitting the case to him for a re-trial of the issue on the *quantum* of damages. We accordingly dismiss both the appeal and the cross-objections, and direct the parties to bear their own costs in this Court.

N. F. E.

Appeal dismissed.

(1) (1875) L. R. 10 C. P. 598.