APPELLATE CIVIL.

Before Bhide and Tapp JJ.

1931 Feb. 26.

NATHU MAL-RAM DAS (DEFENDANT) Appellant

versus

B. D. RAM SARUP & Co. (PLAINTIFFS)

Respondents.

RAM DAS AND ANOTHER (DEFENDANTS)

Civil Appeal No. 2482 of 1925.

Indian Contract Act, IX of 1872, section 107—Contract for sale of goods—breach by buyers—Suit for difference of prices—Indent—Limitation for claim under—period laid down in Indent—whether affects period laid down by Statute —Provision for draft to be drawn—or "in case of need seller's invoice to be taken in lieu of draft"—construction of—Re-sale—reasonable time.

In clause (1) of the indent in suit, the defendant-buyers authorised the sellers to draw upon the buyers at 30 days' sight with all relative shipping documents attached for payment, "in case of need seller's invoice to be taken in lieu of draft," which draft they bound themselves to accept on presentation and pay at maturity notwithstanding any objection they might have. On failure by defendants to take delivery, the plaintiffs (relying upon the terms of the indent, and not upon section 107 of the Indian Contract Act, for their right of re-sale) auctioned the goods and sued for the difference, although no draft had been drawn or presented to defendants. On appeal the question was whether there was a right of re-sale and, if so, whether the sale was valid and effected without unreasonable delay. It was found that there were six other cases deliverable to two other firms and for all ten cases drafts had been drawn on the plaintiffs at Delhi by the shippers and it was contended that the use of the words "in case of need the seller's invoice to be taken in lieu of draft" became meaningless and of no effect, if the forwarding of the invoice was not to be a substitute for and equivalent to the presentation of a draft as provided in clause (3) of the indent.

1931

NATHU MAL-RAM DAS
v.
B. D. RAM SARUP & CO.

Held (following *Rattan Lal-Sultan Singh* v. *Tek Chand-Chuni Lal* (1), that the terms of the contract permitted the substitution of the seller's invoice for the draft as required by clause (1), and that by forwarding the invoice the plaintiff-firm had substantially complied with the terms of the contract, and the failure of the defendant firm to make payment and take up the goods conferred a right of re-sale on the plaintiffs.

Narain Das-Jaini Mal v. *Kidar Nath Gonika* (2), and *Nanak Chand* v. *Panna Lal-Shiv Narain* (3), referred to and discussed.

Held further, that as in the case of a statutory right of re-sale so in the case of a re-sale under a contract, the seller must give notice to the buyer of his intention to do so and re-sell the goods after the lapse of a reasonable time.

And that, in the circumstances of this case, instructions for the auction having been issued a little over one month after receipt of defendants' final repudiation of the contract, and it being clear that the latter were watching the market in order to see whether it would pay them to take up these goods, the sale had taken place within a reasonable time in the circumstances, and the plaintiffs had been rightly decreed the amount representing the loss incurred by them on the re-sale of the goods, being the difference between the contract price and the actual sale price with interest from date of suit till realisation.

Held also, that there was no force in the argument that the claim was time-barred under clause (14) of the indent, which provided that no claim or dispute of any sort whatever could be recognised if not made in writing within sixty days from due date of payment; as such a clause in a contract cannot take away the statutory right of a plaintiff to bring his claim within the time prescribed by law.

First appeal from the decree of Mr. Abdul Haq, Subordinate Judge, 1st Class, Delhi, dated the 31st

(1) 1930 A. I. R. (Lah.) 379. (2) 1928 A. I. R. (Lah.) 817.
(3) 1930 A. I. R. (Lah.) 389.

1931

NATHU MAL-RAM DAS
v.
B. D. RAM SARUP & Co.

May 1925, ordering the defendants to pay to the plaintiff the sum of Rs. 5,450-14-9.

DEV RAJ SAWHNEY, SHAMBU LAL PURI, and JAGAN NATH AGGARWAL, for Appellant.

KISHEN DAYAL, BHAGWAT DAYAL and BISHAN NARAIN, for Plaintiffs-Respondents.

TAPP J.

TAPP J.—Under an agreement, dated the 27th April 1920, referred to in the proceedings and hereafter as the indent, the defendant firm Nathu Mal-Ram Das of Delhi contracted to buy four cases each containing 60 pieces of Zephyr prints at 14 annas per yard free Delhi godown from the plaintiff firm of B. D. Ram Sarup and Co. of the same place. The seller's invoice of these goods was sent to the buyers on the 7th September 1920 and on the 10th September 1920 the buyers asked to be informed of the date of the bill of lading which was duly communicated to them by the sellers on the 11th September 1920 (*vide* Exhibits P-16, P-9 and P-17, on pages 52 and 53 of the printed record). The goods arrived in Delhi in October 1920 and intimation of this was duly intimated by the plaintiffs to the defendants in the formers' letter, dated 26th October 1920 (Exhibit P-18 on page 59). The defendant firm did not take delivery of the goods and on the 5th January 1921 (*vide* Exhibit P-19 on page 62) the plaintiff firm reminded the defendant firm of their failure to take up the goods and asked them to do so at once. No reply was vouchsafed to this letter till the 25th June 1921 when the defendant firm referring to the letter of the 5th January 1921 wrote saying that they had several times verbally asked the plaintiff firm to deliver the goods but in spite of these repeated requests they had failed to do so. Under the circumstances the goods had been cancelled but in

order to " avoid unpleasantness and as a friend " the defendant firm requested the plaintiffs to deliver the goods in question within three days against full payment failing which the contract would be considered as cancelled and the defendant firm would not be responsible for the consequences (*vide* Exhibit P.-7 on page 74). To this letter the plaintiff firm replied on the same day expressing their immediate readiness to deliver the goods against full payment (*vide* Exhibit P.-20 on page 74). No reply was sent to this letter by the defendant firm and again on the 12th July the plaintiff firm reminded the defendant firm of their failure to take delivery and requested them to do so and make payment either to the Hindustani Mercantile Association or through one *Babu* Raj Nath. No reply was sent to this letter either and again on the 9th November 1921 the plaintiff firm reminded the defendant (*vide* Exhibit P-22 on page 75) and to this communication the defendants replied on the 18th November 1921 (*vide* Exhibit P-11 on page 25) stating that the plaintiffs had failed to fulfil the terms of the contract and consequently the goods had been cancelled. If plaintiffs under the circumstances auctioned the goods or took any action against the defendant firm, they would do so entirely at their own risk and would be responsible for all the consequences.

The plaintiffs treating this as a final repudiation of the contract instructed the firm of Messrs. J. R. Basheshar Nath on the 27th December 1921 to sell the goods by public auction on account and risk of the defendant firm (*vide* Exhibit P-8 A on page 76). The auctioneers informed the defendant firm on the 28th December 1921 of the instructions received by them from the plaintiffs and in reply to this were in-

1931

NATHU MAL-RAM DAS
v.
B. D. RAM SARUP & Co.

TAPP J.

formed by the defendant firm that the goods had been cancelled and that if they were auctioned the auctioneers and the plaintiffs would be held responsible. Public notice of the sale was duly given and on the 23rd January 1922 the goods were auctioned, the highest bid then made being 7 annas 4½ pies per yard. Intimation of this was also sent to the defendant firm by the auctioneers and they were asked to make a higher offer, otherwise the goods would be knocked down. The defendant firm again informed the auctioneers that they had cancelled the goods and referred to their letter of the 6th January mentioned above The plaintiff firm thereupon bought in the goods themselves at 7 annas, 6 pies per yard. In this connection see Exhibits P W. 12/2, P.-3, P. W. 12/6, P. W 12/9, P. W. 12/11 and P. W 8/1 on pages 77 to 81 of the printed record). The goods realised Rs. 6,133-5-9 at the rate of 7 annas, 6 pies per yard and on the 26th February, 1922, or about a month after the sale the plaintiff firm brought the present suit for recovery of Rs. 6,842-14-9 as representing the loss incurred by them on the re-sale of the goods and being the difference between the contract price of 14 annas per yard and the re-sale price of 7 annas 6 pies per yard plus interest. They also prayed for interest at 12 annas *per cent. per mensem* from the date of institution of the suit till the date of realization on the amount claimed. The defendants raised various pleas, all of which were rejected by the Court below and the suit was decreed in plaintiffs' favour for Rs. 5,450-14-9 with proportionate costs and interest at 6 *per cent. per annum* from the date of suit till date of realization. The interest included in the amount claimed was disallowed.

The above facts are either admitted or proved and the only two questions which arise for determination

are (1) whether there was a right of re-sale; and (2) whether the sale was valid and there was no unreasonable delay. The plaintiff firm did not claim a right of re-sale under the statute (section 107 of the Indian Contract Act) but under the terms of the indent. The relevant clause of the indent by which this right is conferred is clause (3) which authorises the sellers to sell the goods by public auction or private sale when and where they like after ten days' notice of their intention to do so, should the buyers fail to accept the draft on presentation or fail to pay at maturity. Reference to this draft is made in clause (1) of the indent the material portion of which runs as follows :--

"We authorise you or your correspondents to draw upon us at 30 days' sight with all relative shipping documents attached for payment. In case of need seller's invoice to be taken in lieu of draft, which draft we engage and bind ourselves to accept on presentation and pay at maturity notwithstanding any objection we may have, etc., etc."

Admittedly no draft was drawn on or presented to the defendant firm, and on behalf of the plaintiff-respondents it was contended by Mr. Kishen Dayal that the defendants had never specifically pleaded nor urged in the grounds of appeal that the failure to do so had deprived the plaintiffs of their right of re-sale. In reply it was urged that the statement of the counsel for the defendants in the lower Court was that no draft was drawn on them as required by the terms of the indent and hence they were not liable and paragraph 7 of the memorandum of appeal clearly indicated this line of defence. Attention was also drawn to issue No. 7 which runs as follows :—"Is the defendant firm not liable because no draft was drawn on them?"

1931

NATHU MAL-RAM DAS
v.
B. D. RAM SARUP & CO.

TAPP J.

The matter is certainly not clear and it would have been better if the defendant firm had specifically averred that the plaintiffs had lost their right of re-sale in consequence of their failure to present the draft to the defendants, but taken as a whole the point does emerge for consideration from paragraph 6 of the written statement of one of the defendants (*vide* page 3 of the record), the statement of counsel already referred to, issue No. 7 and paragraph 7 of the memorandum of appeal. In the circumstances we have allowed the matter to be debated, bearing in mind, however, the contention of Mr. Kishen Dayal that any adverse decision in the matter should not prevent the plaintiffs from proving a right of re-sale under the statute.

This particular point has been the subject of discussion and decision in three rulings of this Court, namely, *Narain Das-Jaini Mal* v. *Kidar Nath Gonika* (1) *Nanak Chand and others* v. *Panna Lal-Shiv Narain* (2) and *Rattan Lal-Sultan Singh* v. *Tek Chand-Chuni Lal* (3). In all these three cases the terms of the contract were contained in a similar indent, of which clauses 1 and 3 were indentical. In the first case cited the contention was that the wording of the contract did not provide for nor authorise re-sale of the goods under any circumstances. Reliance was placed on the passage in the first clause as to the seller's invoice being substituted in case of need for a draft and the presentation of the invoice being merely an alternative for the presentation of the draft. The same result, it was urged, should be taken to flow from the failure of the purchaser to take delivery in accordance with the invoice. The learned Judges held that in

(1) 1928 A. I. R. (Lah.) 817. (2) 1930 A. I. R. (Lah.) 389.
(3) 1930 A. I. R. (Lah.) 379

interpreting a document like the indent they were precluded from going beyond the clear wording of the terms and conditions entered therein and it was not open to them to put an equitable interpretation on the agreement or to say, that it was only right that the purchaser should be penalised for refusing delivery even more than for refusing to accept the draft. In the case in question the invoice was sent and this was followed by intimation of arrival and it was on receipt of this intimation that a breach took place in accordance with the terms of the contract. The written contract not providing any special penalty for a breach, the only consequences under the circumstances resulting from such breach were those provided in the contract. Hence it was held that as there had been no appropriation, no right of re-sale had been conferred on the seller by section 107 of the Contract Act.

In the second case the argument as to the substitution of the seller's invoice for the draft was advanced and the learned Chief Justice, while conceding that there was some force in the argument, felt that he was bound by the decision in *Narain Das-Jaini Mal* v. *Kidar Nath Gonika* (1) and held that the sellers had no right of re-sale under the contract and were not entitled to claim damages on the basis of the difference between the contract price and the price realised on re-sale.

In the third case (2) the contention as to the invoice being a sufficient substitute for the draft was accepted and it was held that the forwarding of the invoice by the seller to the buyer on the arrival of the goods and the refusal of the latter to pay and take delivery accompanied by an intimation that he

(1) 1928 A. I. R. (Lah.) 817. (2) 1930 A. I. R. (Lah.) 379.

1931

LATHU MAL-RAM DAS
v.
B. D. RAM ARUP & Co.

TAPP J.

had cancelled the contract was a substantial compliance by the seller with the terms of the contract and there was a right of re-sale thereunder. One of the learned Judges who delivered the judgment last mentioned was a party to *Narain Das-Jaini Mal* v. *Kidar Nath* (1), and the other was a party to *Nanak Chand* v. *Panna Lal-Shiv Narain* (2). In a separate judgment in the last mentioned case Tek Chand J., who was a party to the first case cited, has reconciled the conflicting views taken in that case and No. 2, by showing that the terms of the contract in these two cases were wholly dissimilar to the terms in No. 3. He therefore distinguished both those cases from *Rattan Lal-Sultan Singh* v. *Tek Chand-Chuni Lal* (3).

Now it seems to me that the use of the words " in case of need the seller's invoice to be taken in lieu of draft " becomes meaningless and of no effect if the view is correct that the forwarding of the invoice is no substitute for an equivalent to the presentation of a draft as provided in clause (3) of the contract. If the forwarding of an invoice were to be considered as not being a sufficient substitute for and equivalent to the presentation of a draft, then it was unnecessary to make any provision for this in clause (1) of the contract. As observed by Agha Haidar J. in case No. 3 (3) cited above, " the seller may have entered into a contract to sell the goods, which he is expecting from England, to a number of persons in various lots and, if each and every one of his buyers were to insist upon having the original draft and the shipping documents being presented to him, it

(1) 1928 A. I. R. (Lah.) 817. (2) 1930 A. I. R. (Lah.) 389.
(3) 1930 A. I. R. (Lah.) 379.

would give rise to an impossible situation. Thus if one buyer had purchased three bales only, it would be absolutely futile on the part of the seller to send him a draft relating to 15 cases which will have to be distributed perhaps among three or four different buyers and to expect him to make full payment. The same reasoning applies to the case of shipping documents." This is exactly what happened in the present case, as a reference to certain documents filed therein shows that there were six other cases deliverable to two other firms and for all 10 cases drafts had been drawn on the plaintiffs by the shippers through the National Bank of India at Delhi.

For the above reasons I would follow the decision in *Rattan Lal-Sultan Singh* v. *Tek Chand-Chunni Lal* (1), and hold that the terms of the contract permitted the substitution of the seller's invoice for the draft as required by clause (3) and by forwarding the invoice the plaintiff firm substantially complied with the terms of the contract and the failure of the defendant firm to make payment and take up the goods conferred a right of re-sale on the plaintiffs.

As in the case of a statutory right of re-sale, so in the case of a re-sale under a contract, the seller must give notice to the buyer of his intention to do so and re-sell them after the lapse of a reasonable time. As shown above notice of this intention was duly given and it now remains to be seen whether there was any unreasonable delay on the part of plaintiff firm in re-selling the goods. In this connection it was strenuously urged that there was unreasonable delay, inasmuch as the re-sale took place

(1) 1930 A. I. R. (Lah.) 379.

1931

NATHU MAL-RAM DAS
v.
B. D. RAM SARUP & CO.

TAPP J.

some seven months after the 25th June 1921 when the defendant firm repudiated the contract. In my opinion it is not possible to treat this letter of the defendant firm as a final repudiation of the contract, seeing that they still expressed their readiness to take over the goods if delivery was made within three days against full payment and the attitude of the plaintiffs, as conveyed in their letter of the same date, intimating their readiness to deliver the goods on payment of their invoice. It was surely the business of the defendant firm in the circumstances to tender the money and take over the goods, but this they entirely failed to do notwithstanding the subsequent letters of the plaintiff firm of the 12th July and the 9th November 1921. In my opinion the final repudiation of the contract by the defendant firm is contained in their letter of the 18th November 1921, Exhibit P.-8, and a consideration of the documentary and oral evidence undoubtedly conveys to my mind that the defendant firm were carefully watching the market in order to see whether it would pay them to take up these goods.

There is evidence on the record to show that from June 1921 to January 1922 the market with respect to these particular goods was fairly steady, the retail price varying between 10 annas and 8 annas per yard. On receipt of the letter of the 18th November 1921, which, as observed above, was the final repudiation of the contract by the defendant firm, the plaintiffs do not appear to have unduly delayed the re-sale of the goods, for it was only a little over a month after receipt of the defendants' letter that they issued instructions for the sale of the goods. In view of all these circumstances I would hold that

the period intervening between the 18th November 1921 and the 23rd January 1922 when the goods were actually sold was a reasonable time and the defendants were not in any way prejudiced by this lapse of time. The validity of the sale was questioned on the ground that the plaintiffs were the eventual purchasers of these goods, but this argument has no force, in my opinion—*vide Rattan Lal-Sultan Singh* v. *Tek Chand-Chuni Lal* (1).

It is unnecessary to consider the argument that the claim is time barred under clause (14) of the indent which provides that no claim or dispute of any sort whatever can be recognised if not made in writing within sixty days from due date of payment, as such a clause in a contract cannot in my judgment take away the statutory right of a plaintiff to bring his claim within the time prescribed by law.

I would, therefore, dismiss the appeal with costs.

BHIDE J.—I agree. BHIDE J.

N. F. E.

Appeal dismissed.

---

(1) 1930 A. L. R. (Lah.) 379.