APPELLATE CIVIL.

Before Sir Ernest H Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

1940

Mar. 4.

JAGANNATH SAGARMAL

v.

J. J. AARON & CO.*

Sale of goods—Readiness and willingness to perform contract—Ability to perform contract—Suit by buyer for damages for non-delivery—Buyer's readiness and willingness to pay—Date of delivery at seller's option—Notice to buyer as to date of delivery—Last day of delivery—Buyer's readiness on last day without notice

Readiness and willingness to perform a contract includes ability to perform.

De Medina v. *Norman*, 9 M. & W. 820, referred to.

In a suit by the buyer for damages for breach of a contract for non-delivery of goods sold to him, it is incumbent upon him to satisfy the Court that he was ready and willing with the money or had the capacity to pay for the goods, or that he had at all events made proper and reasonable preparations and arrangements for securing the purchase money.

Chengravelu & Sons v. *Akkarapu & Sons*, 49 Mad. L.J. 300; *Ganesh Das* v. *Ram Nath*, I.L.R. 9 Lah. 148; *Morton* v. *Lamb*, 7 T.R. 125; *Shiriram* v. *Madangopal*, I.L.R. 30 Cal. 865 (P.C.), referred to.

If the date of delivery of goods is at the seller's option then he must give sufficient notice to the buyer of his intention to deliver on a given date during the currency of the option so as to enable the buyer to arrange for funds. But if the seller has not exercised his option earlier, then on the last day of delivery under the contract the buyer must be ready and willing to take delivery of the goods and to pay for the same without any notice on the part of the seller.

Clark (with him *Rauf*) for the appellant.

Aiyangar for the respondents.

DUNKLEY, J.—This appeal arises out of an action for damages for breach of contract. The contracts in question were nine contracts whereby the defendant-respondent undertook to sell and deliver certain shares at certain named prices to the plaintiff-appellant. The contracts are evidenced by bought notes, eight of which are dated the 12th December, 1938, and one is dated the

* Civil First Appeal No. 139 of 1939 from the judgment of this Court on the Original Side in Civil Regular Suit No. 40 of 1939.

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13th December, but it is common ground that these contracts were considered and intended by the parties to be one indivisible contract, the different parts of which were recorded in separate notes. The contracts were for delivery of the shares on or before 31st January, 1939, at seller's option.

The plaint set out that the respondent failed to deliver the shares either before or on the 31st January, 1939, although the appellant was ready and willing to pay for them and take delivery, and that in consequence of the respondent's failure to make delivery the appellant had suffered loss, particulars of which were set out in the plaint. The defence was that the appellant was never ready and willing to perform his part of the contract because he was never in a position to obtain funds to pay for the shares.

Now, section 32 of the Sale of Goods Act lays down that " unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods." Section 51 of the Contract Act 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." Readiness and willingness to perform includes ability to perform [*De Medina* v. *Norman* (1)]. In a suit by the buyer for damages for breach of a contract for sale of goods it is incumbent upon him to satisfy the Court that he was ready and willing with the money or had the capacity to pay for the goods, or that he had at all events made

(1) (1842) 9 M. & W. 820.

proper and reasonable preparations and arrangements for securing the purchase money. [*Morton* v. *Lamb* (1), *Shiriram Rupram* v. *Madangopal Gowardhan* (2), *G. K. Chengravelu & Sons* v. *Akarapu Venkanna & Sons* (3), *Ganesh Das Ishar Das* v. *Ram Nath and others* (4).] It has been urged on behalf of the appellant that as delivery of the shares was under the contract to be at the seller's option there must be implied an additional term to the contract that the seller shall give to the buyer sufficient notice of his intention to make delivery and a reasonable time in which to arrange for funds with which to pay for the shares. With this proposition I am in entire agreement in relation to a delivery of the shares made during the currency of the option. But it has been further argued that when the appellant did not, at some reasonable time prior to the last day for delivery, *i.e.*, 31st January, receive notice of the respondent's intention to deliver the shares on the 31st January he was entitled to assume that the respondent did not intend to carry out his part of the contract and therefore it was not incumbent on him to make any preparation for payment for the shares. With this further proposition I am unable to agree. When the seller had failed to exercise his option to deliver the shares on or before the 30th January, the contract plainly became a contract to sell and deliver the shares on January 31st, and the appellant had to be ready and willing to take delivery of the shares and pay for them on that date. No notice to the buyer of intention to deliver on January 31st was necessary.

Consequently at the trial the contest centred round the question of the appellant's ability to pay for the shares on January 31st. For the appellant it is contended that very little evidence was necessary to

(1) 7 T.R. 125.
(2) (1903) I.L.R. 30 Cal. 865, 871.
(3) 49 Mad. L.J. 300.
(4) (1927) I.L.R. 9 Lah. 148.

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prove his readiness and willingness, especially as he stood to make a substantial profit out of the purchase of these shares, and certain observations of their Lordships of the Privy Council in *Shiriram Rupram* v. *Madangopal Gowardhan* (1) are quoted. With this contention I should be prepared to agree, but there is no evidence whatever on which it could be held that the appellant was able to pay for the shares ; on the contrary, the evidence shows that he could not have paid for them. The appellant had three banking accounts, a current account with the Central Bank of India and two overdraft accounts with the Mercantile Bank and the National City Bank. On the 31st January the balance in his current account at the Central Bank was only a few rupees, and it is admitted that he could not obtain further loans from either of the other Banks without depositing more shares as security. He could have obtained an advance from the Mercantile Bank or the National City Bank against the purchase of these shares, to be deposited as security for the advance when purchased, but the amount which either Bank would have been prepared to advance would naturally not have been sufficient to pay the purchase price, and the evidence shows that the appellant would have had to find a sum of about Rs. 12,000 from other sources. There is no evidence whatever that he had made any preparation to have this amount available when required. The appellant has made a vague and worthless statement that he could have borrowed this amount from rich relatives, but he does not suggest that he had made any arrangements to do so. It is clear that he himself had no resources at all. On January 30th he was obliged to sell to the respondent for Rs. 8,437-8-0 certain shares

(1) (1903) I.L.R. 30 Cal. 865, 871.

which were deposited with the National City Bank as security in order to reduce his overdraft with that Bank. On the same day he was unable to meet a draft for Rs. 2,820 which the Central Bank held against him in payment for certain shares which he had purchased in Calcutta. In order to meet this draft he was obliged to sell these shares to the respondent, and when the respondent suggested that, instead of paying cash therefor, the price should be set off in part payment of the shares to be delivered on the next day, the appellant insisted on cash payment to enable him to clear the draft. In my opinion, it has been proved that the appellant was in a state of acute financial embarrassment on the 31st January, and could not have paid for the shares bought if the respondent had delivered them to him. The appellant was not ready and willing to carry out his part of the contract, and therefore the respondent was absolved from his liability under the contract. The suit of the plaintiff-appellant was rightly dismissed, and this appeal fails and is dismissed with costs.

ROBERTS, C.J.—I agree.