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inasmuch as this very point was substantially decided by this Court against the present appellant in Second Appeal No. 119 of 1904. That second appeal arose out of an application for execution of this very decree, which both the Courts below had dismissed because the appellant had not paid the Court fee. The second appeal was decided by Crowe, J., and myself and we confirmed the order of the lower Courts dismissing the application. There is no written judgment. Mr. Markand Mehta for the appellant reminds me that the ground on which Crowe, J., and I confirmed the order was that the plaintiff had no right to execution without payment of Court fee. And it was so, if I re-collect rightly. That was no adjudication either that the application then made or any previous application was not in accordance with law for the purposes of limitation or that the condition in the decree as to Court fees was of such a character that the Court fee must be paid *first* and the application for execution could only be made *afterwards*.

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

P. R. & Co., APPELLANTS AND PLAINTIFFS, *v.* BHAGWANDAS CHATURBHUJ, RESPONDENT AND DEFENDANT.*

1909.

March 10.

Suit for price of goods bargained and sold—Cause of action—Indian Contract Act (IX of 1872), sections 39, 73, 120—Indian Contract Act has not altered the law relating to recovery of debts and liquidated demands—Civil Procedure Code (Act V of 1908), section 128.

Before the passing of the Indian Contract Act wherever a consideration was executed for which a debt payable at the time of action had accrued due either under an express promise or under one implied by law the debt might be sued for in an *indebitatus* count; thus the count lay where the consideration moving from the seller of goods was executed by his providing goods and only the money debt due by the buyer remained. The form of count in such a case

* Appeal No. 65. Suit No. 619 of 1908.

both in England and in Bombay would have been for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant. The cause of action was said to sound in debt and not in damages.

In section 128 of the Civil Procedure Code of 1908 there is legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in British India.

The Indian Contract Act has not altered the law relating to the recovery of debts and liquidated demands. The fact that a party to a contract may under section 39 of the Indian Contract Act, when the other side has refused to perform it, put an end to it and sue for compensation for the breach does not oblige him to take that course at his peril; he may if he prefers it sue to recover any debt due to him which has arisen from his execution of his part of the contract.

Per BATCHELOR, *J.*:—Section 73 of the Indian Contract Act prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract which he for his part keeps on foot. If that is so, the mere absence from the Act of a specific provision giving the remedy of a suit to recover the price cannot be construed as the distinct legislative withdrawal of that remedy.

APPEAL from the judgment of Knight, J.:—

On the 3rd September 1907 the defendants agreed to purchase from the plaintiffs 440 cases of Turkey red goods on the terms of a written contract. There arose a dispute between the plaintiffs and the defendants as to whether the goods which the plaintiffs tendered under the contracts were equal to sample and after certain correspondence between the parties the defendants agreed to take delivery of the goods on getting certain allowances at various rates in respect of different goods. The defendants having failed to take delivery or to pay for the goods the plaintiffs claimed to recover from the defendants the price of the goods save as to 22 cases which did not arrive within contract time after deducting the allowances aforesaid.

At the hearing seventeen issues were raised of which sixteen were on questions of fact and were found in the plaintiff's favour. The other issue, *viz.*, whether the plaintiffs could sue for the price of the goods was found in the defendant's favour and the suit was dismissed with costs, Knight, J., holding that though the

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property in the goods had passed to the defendant and he was bound to pay for the goods a suit for damages for breach of contract in not accepting the goods was the only remedy open to the plaintiffs and the plaintiffs not having proved damages based upon the difference between the contract rate and the rate at the date of the defendant's failure to take the goods they could not recover. Against this decision the plaintiffs appealed.

Strangman, Advocate General, and *Inverarity* for the appellants:—We submit that the view taken by the Court below is not correct. In the first instance the Contract Act is not exhaustive. Its preamble says that it defines and amends certain parts of the law relating to contract, it does not consolidate the law. The Privy Council judgment in *Irrawaddy Flotilla Company* v. *Bugwandass*[1] lays down that the Act is not exhaustive. The rulings of the Privy Council cited by the learned Judge do not seem to support the inferences drawn from them. We therefore submit that although the Contract Act does not anywhere specifically provide for a suit being filed by the vendor for the price, it does not by implication or otherwise exclude that remedy. The Act was passed in 1872 but in the Civil Procedure Code of 1882 forms of plaints are given (Forms 10 and 12) for a suit by a vendor for the price of goods sold but not accepted or taken delivery of by the purchaser. The same forms are reproduced in the new Civil Procedure Code of 1908 (Forms 3 and 6).

Buchanan v. *Avdall*[2] and *Pray Narain* v. *Mul Chand*[3] support the view that a suit for the price can be maintained in India, both these cases had been discounted by the learned Judge, the first on the ground that it was before the passing of the Specific Relief Act 1877, section 21 of which prohibits a suit for specific performance of a contract wherein monetary compensation would be an adequate relief; and the second on the ground that it hardly applies to the case. As regards the first case the learned Judge's argument may be met by the answer that although in 1876 the Specific Relief Act was not passed yet the principle laid down in section 21 of that Act was not a new rule of

(1) (1891) L. R. 18 I. A. 121. (2) (1875) 15 Ben. L. R. 276 at p. 292.
(3) (1897) 19 All. 535.

law enacted in 1877 but it was only the codification of the English principle or rule of equity then in existence and applicable to Courts in British India and secondly the learned Judge does not say that section 21 of the Specific Relief Act bars this suit, but says that the Contract Act does not allow it. The decision in *Buchanan* v. *Avdall*[1] is after the passing of the Contract Act and entitled to weight. As regards section 120 of the Contract Act we submit the learned Judge has misunderstood it. We submit that section 120 relates to the cases of what is known in the English Law as "anticipatory breach". The words in the section are "refuses to accept" not "refuses to take delivery". If a buyer says that he will not accept the goods sold then the vendor is immediately entitled to treat this as a breach of the contract, he need not wait till the time of performance, *i.e.*, the taking of the delivery arrives, he may treat the refusal as a breach and may rescind the contract and sue for damages at once, that is, he may exercise the power given to him by section 39 of the Act; see illustration (*c*) to section 73. But we submit the vendor is not bound to do so. He may not choose to rescind the contract (the words in section 39 are "may" put an end to the contract) and enforce whatever remedies he has. If for some reason the remedy of resale cannot be validly made we submit that the vendor is not compelled by the Contract Act to rescind the contract; for if the learned Judge's view is correct it comes to this that a vendor must either resell or if he cannot do it he must rescind the contract. We submit the Act does not compel him to do so. Nor is section 120 intended to have that effect. If he is not bound to rescind and if he has not resold or cannot validly resell, it is his remedy to sue for the prices. If the Contract Act had not been passed and the English Common Law had applied he would certainly have sued for the price. Is his right taken away by the Contract Act? As stated above the Act not being a consolidation of the law of contract but meant only to define some parts thereof we submit the right is not taken away.

Setalvad and *Desai* for the respondent:—In India having regard to the provisions of the Indian Contract Act if a pur-

(1) (1875) 15 Ben. L. R. 270.

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chaser wrongfully refuses to take delivery of the goods the vendor of the goods cannot sue the purchaser for the price of the goods sold but not delivered whether the property or the goods has passed to the purchaser or not. The vendor's only remedy is to sue for damages for breach of contract. If the vendor has exercised the power reserved to him by section 107 of the Contract Act and resold the goods on account of the purchaser the measure of damages would be the difference between the contract price and the prices realised at the resale, but if the vendor has not exercised or could not exercise the power of resale the damages would be the difference between the contract price and the market price of the goods at the date of the breach. The vendor has no other remedy. We rely on sections 120 and 73 of the Indian Contract Act. The Common Law of England allowed a vendor to sue for the price of goods bargained and sold but not delivered when the property in the goods had passed to the purchaser and the same rule of law was codified by section 49 of the Sale of Goods Act, 1893. When the Contract Act was passed in 1872, this rule of the English law was not embodied in it. The Contract Act is exhaustive and therefore the legislature must be deemed to have excluded this remedy in India.

See *Gokul Mandar* v. *Padmanund Singh*[1], *Mohori Bibee* v. *Dharmodas Ghose*[2].

Strangman in reply.

Scott, C. J.:—On the 3rd of September 1907 the defendant agreed to purchase from the plaintiffs 440 cases of Turkey Red goods on the terms of a written contract. Disputes arose as to whether the goods tendered by the plaintiffs were equal to sample and eventually the defendant agreed to take the goods subject to certain allowances. The defendant afterwards failed to take delivery or to pay for the goods and the plaintiffs brought this suit to recover the amount payable under the contract less the said allowances amounting with interest to the date of suit to Rs. 1,11,573-4-9.

(1) (1902) L. R. 29 I. A. 126 at p. 202. (2) (1908) 30 Cal. 539 at p. 548.

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The learned Judge of the lower Court found that the property in the goods had passed to the defendant and that he was bound to take delivery and pay for the goods but being of opinion that a suit for damages for breach of contract in not accepting the goods was the only remedy open to the plaintiffs and the plaintiffs not having proved damages based upon the difference between the contract rate and the market rate at the date of the defendant's failure to take the goods he dismissed the suit with costs.

The reasoning by which the learned Judge arrived at the conclusion that a suit for the price of goods sold is not maintainable is briefly as follows :—

The English Sale of Goods Act, 1893, explicitly provides that where the property has passed to the buyer and he neglects to pay the seller may maintain an action for the price. The Indian Contract Act does not contain any such provision. The Indian Contract Act is exhaustive of the law of India relating to the sale of goods; therefore such an action is since the passing of the Indian Contract Act no longer maintainable in India.

I think it can be demonstrated that this inference as to the intention of the Indian legislature is erroneous.

Before the passing of the Indian Contract Act wherever a consideration was executed for which a debt payable at the time of action had accrued due either under an express promise or under one implied by law the debt might be sued for in an *indebitatus* count (Bullen & Leake's Precedents of Pleadings, 2nd Edn., p. 29); thus the count lay where the consideration moving from the seller of goods was executed by his providing goods and only the money debt due by the buyer remained. The form of count in such a case both in England and in Bombay would have been for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant. The cause of action was said to sound in debt and not in damages.

Counsel for the respondent in supporting the judgment of the lower Court was driven to contend that since the passing of the Indian Contract Act the only money claim possible under a contract is a claim for damages for breach and that no claim for

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debt can arise out of contract. He contended for example that a suit for the price of goods sold and delivered which he admitted to be maintainable was really a claim for compensation for breach of contract. That this was not the view of the legislature is apparent from the schedule of forms prescribed by section 644 of the Code of Civil Procedure of 1882 in which Part A relates to claims for debts and liquidated demands mostly arising out of contract and part B to claims for compensation for breach of contract. Forms 10 and 12 are forms of plaints for the price of goods sold of which delivery has not been taken.

In section 128 (*f*) (i) of the Civil Procedure Code, 1908, which was passed some months before this suit was heard though it did not become law until the 1st of January last, it is provided rules may be made for summary procedure in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest arising on a contract express or implied.

Here we have a reproduction with certain immaterial changes due to altered circumstances of the words of section 25 of the Common Law Procedure Act, 1852, which, as can be demonstrated from the forms of pleading in schedule B, Nos. 1 and 36, included suits for the price of goods bargained and sold.

I take it therefore that in section 128 of the Code of 1908 we have legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in British India.

The conclusion is that the Indian Contract Act has not altered the law relating to the recovery of debts and liquidated demands.

The fact that a party to a contract may under section 39 when the other side has refused to perform it put an end to it and sue for compensation for the breach does not oblige him to take that course at his peril; he may if he prefers it sue to recover any debt due to him which has arisen from his execution of his part of the contract.

BATCHELOR, J.:—By a contract made between the parties the plaintiffs agreed to sell and the defendants agreed to buy 440

cases of Turkey Red goods valued at over a lákh of rupees. The defendants on various grounds declined to take the delivery of the goods, and the plaintiffs brought this suit to recover the price with interest at six per cent.

Several questions of fact were raised by the defendant at the trial and were all decided by Knight, J., in the plaintiff's favour; with these questions, however, we have no further concern, as the lower Court's findings are accepted by counsel for the respondent. It will be enough to observe that the state of facts on which this appeal is to be decided is that the defendants had no excuse or justification for refusing delivery of the goods offered, and that the property in these goods had passed to the defendant. Despite these findings the learned Judge conceived himself obliged to dismiss the suit on the ground that a suit for the recovery of the price was not maintainable; the plaintiff's sole remedy being a claim for compensation in damages estimated at the difference between the agreed price and the price at which the plaintiffs could have sold the goods to another person. The question to be determined is whether this view is correct, or whether the plaintiffs are entitled to sue for and recover the full agreed price.

Briefly stated the learned Judge's opinion is based upon the view, urged now by Counsel for the respondents, that the Indian Contract Act is exhaustive, and that by virtue of sections 120 and 73 of the Act the plaintiffs' sole remedy was a suit for compensation for any loss or damage caused to them by the defendants' breach of the contract. It is the admitted fact that the Indian Contract Act does not specifically authorise a suit to recover the price of goods sold even where the property in the goods has passed to the buyer. Moreover, as the learned Judge below has pointed out, it has been laid down by their Lordships of the Privy Council that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and that it is not the province of a Judge to disregard or to go outside the letter of the enactment according to its true construction. See *Gokul Mandar* v. *Padmanund Singh* [1] and the judg-

(1) (1902) L. R. 29 I. A. 196 at p. 202.

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ment of Lord Herschell in *Bank of England* v. *Vagliano Brothers*(1).

The case is carried a step further in *Mohori Bibee* v. *Dharmodas Ghose*(2) where the Judicial Committee in dealing with this particular Act pronounce that so far as it goes it is exhaustive and imperative.

That, as I understand it, is a fair statement of the case for the respondents. The answer to it appears to me to be that this is not a suit for compensation upon the breach of the contract, but is a suit in debt for money owing. *Ex concessis* the property in the goods had passed to the buyers, and that being so, the agreed price became, I think, a sum of money due and owing to the sellers. True, the buyers were guilty of a breach of the contract as defined in section 120 of the Act, but that circumstance did not impose on the sellers an obligation to accept the breach and sue in damages. It was, I conceive, still open to them to affirm the contract and claim the price which had become due under it. That remedy, it is admitted, would have been available to them in Bombay under the English common law before the introduction of the Indian Contract Act of 1872, as it would be available to them now in England under section 49 (1) of the Sale of Goods Act, 1893. It is urged that since no such remedy is provided in the Indian Contract Act, it must be taken to have been excluded on those principles of the construction of a Code to which I have made reference. But the argument is beside the point, if my view of the true character of this suit is right, for in that case the relief claimed is outside the ambit of section 73. That section prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract which he for his part keeps on foot. If that is so, the mere absence from the Act of a specific provision giving the remedy of a suit to recover the price cannot be construed as the distinct legislative withdrawal of that remedy. Though the debt is, no doubt, owing upon a contract, it is owing upon a still affirmed contract,

(1) [1891] A. C. 107 at pp. 144-45. (2) (1903) 30 Cal. 539 at p. 548.

and the suit is in debt and not in damages. Of the principles applicable to such a suit there is no reason to suppose that the Contract Act is the repository, still less that it is the sole repository, for the Act does not purport to do more than "define and amend certain parts of the law relating to contracts." Further room for this opinion is made by the decision of the Privy Council in *Irrawaddy Flotilla Company* v. *Bugwandass*[1] where their Lordships say that "the Act of 1872 does not profess to be a complete Code dealing with the law relating to contracts. . . There is nothing to show that the Legislature intended to deal exhaustively with any particular Chapter or sub-division of the law relating to contracts."

As to illustration (*h*) to section 73, I do not think that it advances the case either way, for, first, we are not told that the property in the iron sold had passed to the buyer, B, and, secondly, A's suit was expressly a suit brought under section 73, and the illustration merely describes the method in which the compensation should be reckoned.

Then I was much impressed by the Advocate General's argument that even in the case of goods sold and delivered the Act makes no provision for a suit to recover the price, though admittedly such a suit would be perfectly good. Counsel for the respondents endeavoured to meet this point by the contention that there the agreed price would be identical with the compensation defined in the section. That may be so, but I am not the less of opinion that the ground of the recoverability would be that the money was a debt due upon a contract still subsisting *quoad* the plaintiff; that seems to me both a simpler and a truer account of the case than to regard the price as the "compensation for loss or damage caused which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it." To my mind the mere recital of these words of the section suggests that it was never intended, and is not appropriate to govern such a suit, but has reference only to the question of computing the amount of damages allowable in a suit where a party damnified

(1) (1891) L. R. 18 I. A. 121 at p. 129; 18 Cal. 620 at p. 628.

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by a breach of contract seeks only to be indemnified. That, I think, is not the case here: the plaintiffs do not ask the Court to assess in money the damage suffered by them in consequence of the defendant's breach of the contract: that has already been done by the parties themselves, and the plaintiffs only seek to obtain that particular sum of money which by the terms of the contract is now money belonging to them in the hands of the defendants.

Forms 10 and 12 of Schedule IV of the Code of Civil Procedure of 1882, which was in force when the suit was instituted, afford further support to the view that the Legislature never intended or attempted to invalidate a suit for the price of goods bargained and sold.

The plaintiffs' suit is admittedly good unless it is prohibited by virtue of section 73 of the Contract Act. For the foregoing reasons I am of opinion that it is not so prohibited, and I therefore agree that the appeal should be allowed with costs.

Appeal allowed.

Attorneys for appellants: *Messrs. Payne and Co.*

Attorneys for respondents: *Messrs. Daphtary, Ferreira and Divan.*

B. N. L.

APPELLATE CIVIL.

1909.

October 1.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

PARASHARAMPANT SADASHIVPANT (original Plaintiff), Appellant, *v.* RAMA *bin* YELLAPPA and another (original Defendants), Respondents.*

Registration Act (III of 1877), sections 17 and 49—Release—Document compulsorily registrable—Registration by mistake in a wrong book—Mistake not to affect parties—Document duly registered—Endorsement releasing mortgaged property for consideration in cash—Registration.

A release whereby a father transferred all his rights of ownership in his immoveable and moveable property in favour of his son was registered not in

*Second Appeal No. 3 of 1909.