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that there is this difference, that under the Indian Contract Act joint promissors are jointly and severally liable, so that a suit could be filed against one without joining the other, and, therefore, it could be deduced, that since defendant No. 2 could have been sued separately on this promissory note by the liquidators, therefore he could have set off the amount due on his deposit account. I do not think that the mere fact that a suit could lie against one of two joint promissors could alter the fact that the original liability of defendant No. 2 was incurred, not on his own account only, but jointly with another, and so result in the nature of the dealings taken as a whole being altered. I think, therefore, that since the dealings on the deposit account and on the promissory note were of a different character, they cannot come within the term "mutual dealings". Therefore the judgment of the lower appellate Court was right. The appeal must be dismissed with costs.

SHAH, J. :—I agree.

Appeal dismissed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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January 28.

BHAILAL CHATURBHAI PATEL (ORIGINAL DEFENDANT), APPELLANT *v.* KALYANRAI VRAJRAI DESAI (ORIGINAL PLAINTIFF), RESPONDENT*.

Contract—Sale of goods—Delivery of goods to be given on arrival of a steamer —Steamer arriving without goods—Warranty that the goods were on board the steamer—Vendor liable for breach of contract.

The defendant contracted to sell goods to the plaintiff under the following terms : "We have duly made a contract to give you the delivery of two tons

* Second Appeal No. 273 of 1920.

of sodium sulphide packed in two cwt. drums of United Alkali's make, shipped per S. S. *City of Delhi* at the rate of Rs. 50 per cwt. delivered at Bombay. In case of the steamer meeting with any accident on the way we are not bound to give you the goods, but on arrival of the aforesaid steamer we are bound to give you the delivery of the goods." The *City of Delhi* arrived in Bombay harbour but it did not carry the contract goods on board. The plaintiff having sued to recover damages for breach of contract,

Held, allowing the suit, that the defendant by contracting that he would be bound to deliver the goods on arrival of the steamer gave a warranty that the goods which he had sold were on board the steamer, but as the steamer arrived without the goods he was liable.

Hale v. *Rawson* [1], relied on.

SECOND appeal against the decision of Dadiba C. Mehta, Assistant Judge of Ahmedabad, reversing the decree passed by G. M. Pandit, Additional First Class Subordinate Judge, at Ahmedabad.

Suit to recover damages.

The plaintiff stated that the defendant who was a dealer in mill stores, contracted in writing on the 6th May 1917 to sell him two tons of Sodium Sulphide of the United Alkali Company's make at Rs. 50 per cwt. to be delivered to him in Bombay on arrival of the S. S. *City of Delhi*. The terms of the contract were as follows :—

" We have duly made a contract to give you the delivery of two tons of Sodium Sulphide packed in two cwt. drums of United Alkali's make shipped per S. S. *City of Delhi* at the rate of Rs. 50 per cwt. delivered at Bombay. In case of the steamer meeting with any accident on the way we are not bound to give you the goods, but on arrival of the abovesaid steamer we are bound to give you the delivery of the goods which please note."

The *City of Delhi* arrived in July 1917 but it did not carry the contracted goods. The plaintiff, therefore, sued to recover Rs. 1,400 being the amount of damages sustained by him owing to the defendant's breach of contract.

[1] (1858) 4 C. B. N. S. 85.

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The defendant admitted the sale of two tons of Sodium Sulphide to plaintiff but contended that he had previously ordered those goods from the United Alkali Company of Liverpool through their Ahmedabad Agents; that the delivery according to the contract was to be given to plaintiff on arrival of the goods in Bombay by the S. S. *City of Delhi*; that owing to the uncertainty of shipping due to enemy submarinism, the United Alkali and Company were unable to send the goods by the *City of Delhi*, but they sent them by a subsequent boat called the *Milford Hall* which was sunk by the King's enemies; that there was thus no breach of contract on his part.

The Subordinate Judge held that the plaintiff was not entitled to any damages as on construction of the contract the defendant's liability to delivery was subject to the fulfilment of two conditions, namely, the arrival of the steamer and the arrival of the goods by it; that though the steamer arrived, it had not the contract goods on board. He relied on section 32 of Contract Act and *Boyd* v. *Siffkin*[1]; *Johnson* v. *Macdonald*[2].

On the appeal the assistant Judge held that the two-fold contingency, namely, the contingency of the ship arriving safe, and the contingency of the goods being on board the steamer was not contemplated by the parties to the agreement; that the plaintiff entered into an agreement because he was assured by the defendant that the goods were already shipped by the *City of Delhi*; and thus the assurance on the defendant's part amounted to an implied warranty. Relying on *Hale* v. *Rawson* (1858) 4 C. B. N. S. 85, Halsbury's Laws of England, Vol. 25 at pages 144-145; Benjamin on Sale, 4th edition, 565, the Judge held that there was

(1) (1809) 2 Camp. 326.

(2) (1842) 9 M. & W. 600.

breach of warranty and allowed the plaintiff's claim for damages.

The defendant appealed to the High Court.

G. S. Rao, for the appellant.

G. N. Thakor, for the respondent.

MACLEOD, C. J.:—The plaintiff filed this suit to recover damages from the defendant for breach of contract. The contract was as follows :—"We have duly made a contract to give you the delivery of two tons of sodium sulphide packed in two cwt. drums of United Alkali's make shipped per S. S. *City of Delhi* at the rate of Rs. 50 per cwt. delivered at Bombay. In case of the steamer meeting with any accident on the way we are not bound to give you the goods, but on arrival of the abovesaid steamer we are bound to give you the delivery of the goods which please note." The *City of Delhi* arrived in July 1917. It had not the contract goods on board. The question arises then, whether it was a condition of the contract that the goods should be on the steamer on her arrival, or whether it was an absolute contract to deliver the goods on arrival of the steamer or to be responsible for breach of the contract.

It seems to me that the learned appellate Judge was right in holding that this case comes within the decision of *Hale* v. *Rawson*[1] and not within the cases relied upon by the trial Judge, viz., *Boyd* v. *Siffkin*[2] and *Johnson* v. *Macdonald*[3]. The decisions in those cases provide an answer to the different contentions which have been set up by the parties in this case. It is open to the parties to contract in any way

(1) (1858) 4 C. B. N. S. 85. (2) (1809) 2 Camp. 326.

(3) (1842) 9 M. & W. 600.

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they please. But if a suit is filed on the contract, the Court can only give effect to what the parties have agreed to according to the terms of the writing if there is one. If the plaintiff had said that on arrival of the goods in the steamer he would give delivery, then clearly the contract would be conditional on the steamer arriving with the goods. But unfortunately he said that on arrival of the steamer he would be bound to give delivery of the goods. In *Hale* v. *Rawson*[1] the defendant contracted to sell to the plaintiffs fifty cases of East India tallow to be paid for by the plaintiffs to the defendant in cash fourteen days after finishing the landing thereof with 2½ per cent. discount, to be delivered by the defendant to the plaintiffs on safe arrival of a certain ship or vessel called the *Countess of Elgin*. The defendant contended that as the price was not to be paid till a certain time after the landing, there was also an implied condition that the tallow should arrive in the ship. But the Court said (p.96): "Now, if there were no such stipulation as to the time of payment, the contract would surely be, to deliver the tallow out of the ship if she arrived, whether it should be possible or impossible to perform the contract. How, then, can it make any difference that the plaintiffs undertake, in case the contract is performed by the defendants' delivering the tallow out of the ship, to pay for it within a certain time after it is landed." In *Johnson* v. *Macdonald*[2] the plaintiff agreed to buy 100 tons of Nitrate of Soda at the rate of 18 shillings for every cwt. duty paid, to arrive by a certain vessel called the *Daniel Grant*. It was held that the word "to" did not mean that the goods should arrive, but merely that they might be sold on their arrival. And therefore that, according to its true meaning, the language of the contract rendered the performance of it conditional on

(1) (1858) 4 C. B. N. S. 85. (2) (1842) 9 M. & W. 600.

a double event, the arrival in safety of the vessel and her cargo. In *Boyd* v. *Siffkin*[1] the contract was "Sold for Mr. H. Siffkin to Mr. M. Boyd, about 32 tons, more or less, of Riga Rhine hemp, *on arrival* per *Fanny and Almira*." Lord Ellenborough said: "*On Arrival* means on arrival of the hemp. The parties did not mean to enter into a wager. By '*sold* and *bought*' in the note must be understood *contracted* to sell and to buy. The hemp was expected by the ship. Had it arrived, it was sold to the plaintiff. As none arrived, the contract was at an end." It is certainly unfortunate for the defendant in this case that he was not more particular about the wording of this contract. But we cannot make allowances, when the case comes to Court, for mistakes of this kind, as the plaintiff was entitled to rely upon the strict terms of the contract.

It was argued that section 20 of the Indian Contract Act applied, as there was a common mistake of an essential fact, and so the agreement was void. But the illustration shows in what cases it was intended that the section should apply. If parties agree to the purchase or sale of a specific article and it happens that at the time of the agreement the specific article is not in existence, then it can be clearly said that there is a common mistake as to an essential fact and the agreement is necessarily void. But the question whether the *City of Delhi* was carrying 2 tons of the contract goods which could be delivered to the plaintiff is not an essential fact to the agreement. It was open to the parties to make it so, and if the defendant chose to sign the contract in the form he did and in effect gave a warranty that these goods that he sold to the plaintiff were on the *City of Delhi* then he must become liable if the ship arrived without the goods.

[1] (1809) 2 Camp. 326.

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I think, therefore, that the judgment of the lower Court is right and the appeal must be dismissed with costs.

SHAH, J.—I agree.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921. *January* 31.

ISMAILJI HAJI HALIMBHAI (ORIGINAL PLAINTIFF), APPELLANT *v.* ISMAIL ABDUL KADAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Indian Limitation Act (IX of 1908), section 13—Dissolution of partnership—Partnership business carried on outside British India—Absence of defendant out of British India—Suit for dissolution in British Indian Court—Exclusion of time—Cause of action—Jurisdiction of Court—Civil Procedure Code (Act V of 1908), section 20.

A partnership consisting of plaintiff, defendant No. 1 and one S. carried on business at Delagoa in South Africa and was managed by defendant No. 1 who lived there. In June 1902 S. died. Defendant No. 1 returned to British India in July 1908 and was there till November 1910 when he returned to Delagoa. Thereafter in October 1915, he came back and settled in British India. In April 1916, the plaintiff sued in a British Indian Court for dissolution of partnership. The question of limitation arising :—

Held, that the suit was in time, for the periods during which defendant No. 1 was absent from British India, should be excluded from the period of limitation, under section 13 of the Indian Limitation Act, 1908.

Atul Kristo Bose v. *Lyon & Co.*[1], followed.

Where the parties to a suit reside within the jurisdiction of a British Indian Court one of them can sue the other for dissolution of partnership in that Court, even although that partnership commenced and was carried on in foreign territory.

* First Appeal No. 118 of 1919.

[1] (1887) 14 Cal. 457.