ORIGINAL CIVIL.

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

ANIRA RAMVALLABH, APPELLANTS AND DEFENDANTS *v.* VASANJI SONS & Co., RESPONDENTS AND PLAINTIFFS*.

1920. *February* 24.

Contract—Sale and purchase of goods of particular quality and description—Breach of contract—Date of breach is the date on which goods are to be supplied according to contract—Date of breach not postponed until it is ascertained whether goods supplied are not according to contract—Measure of damages.

On 9th May 1918, the defendants agreed to sell to the plaintiffs 50 tons of Yellow Katha wheat at Rs 8-2-0 per cwt. The delivery was to be in May-June 1918, at the seller's option. The last day for such delivery accordingly fell on the 30th June 1918. The Railway receipts relating to the contract goods were handed over to the plaintiffs within the contract time. The plaintiffs took delivery and warehoused the goods about the 13th July 1918. On examining the goods the plaintiffs became dissatisfied with their quality and contended that there was not a proper and fair tender of the goods against the contract. Subsequently, a joint survey was held and on 15th August 1918 the surveyors adjudged that the wheat tendered was not of the contract quality. On 20th August 1918, the plaintiffs rejected the goods. On 23rd August 1918, the plaintiffs bought 49 tons of wheat of the quality and description mentioned in the contract, and sued to recover Rs. 2,250-15-0, the difference between the price paid by them for 49 tons and the contract price. The trial Court held that as there was an attempted performance of the contract, the date of the breach must be taken to be the date when the parties actually found that the goods tendered were not of the contract quality and that as there was no delay on plaintiffs' part to buy against the sellers, the plaintiffs were entitled to recover the sum claimed with interest. The defendants appealed: —

Held, reversing the decision of the trial Court,

(1) that inasmuch as the breach of contract was in respect of goods to be delivered at a future date, the ordinary rule applied that the measure of damages was the difference between the contract rate and the market rate at the date of the breach ;

(2) that the date of breach must be considered to be the date when the seller ought to have tendered goods according to the contract and failed to do so ;

* O. C. J. Appeal No. 74 of 1919.

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(3) that in the absence of an agreement to the contrary, the date of the breach was not postponed until it was ascertained whether the goods were of the contract quality or not ;

(4) that as the plaintiffs had failed to prove that the due date must not be taken to be the date of the breach or that there was any difference between the contract rate and the market rate at the due date they were not entitled to claim damages against the defendants.

APPEAL from the decision of Kajiji J. decreeing plaintiffs' suit for damages on breach of contract.

By a contract in writing, dated 9th May 1918, the defendants agreed to sell to the plaintiffs and the plaintiffs agreed to buy from the defendants 50 tons of Yellow Katha wheat of a particular description and quality at Rs. 8-2-0 per cwt. on terms and conditions mentioned in the said writing. The clause in the contract relating to delivery was follows :—

Delivery : May-June 1918, seller's option. Buyers shall not be obliged accept tenders of less than 100 bags at a time.

Buyers shall have the option to refuse Railway receipts if not tendered 9 days before the due date of the contract.

In the event of this contract being for more than 50 tons, each 50 tons to be regarded as separate contract.

The defendants delivered to the plaintiffs three Railway receipts, one on the 25th June 1918 comprising 167 bags of wheat, and two on the 28th June 1918 comprising respectively 167 and 166 bags of wheat. On arrival of the goods comprised in the said Railway receipts the plaintiffs took delivery thereof and warehoused the goods in their godown on or about the 13th July 1918. The defendants received from the plaintiffs the sum of Rs. 6,000, as an advance towards the price of the said goods.

Thereafter, on examination of the goods the plaintiffs found that the same were not a fair and proper

tender against the contract and required the defendants to have a joint survey held on the said goods, as provided in the terms and conditions of the contract. On the 15th August 1918, E, Libertar and M. C. Bronzis the surveyors respectively appointed by the plaintiffs and the defendants held a joint survey and adjudged that the goods delivered by the defendants were not a proper tender and that the plaintiffs were entitled to reject the same with an option to accept the goods at an allowance mentioned in the award.

On 20th August 1918, the plaintiffs by their letter informed the defendants that they rejected the goods tendered and requested the defendants to remove the same after repaying to the plaintiffs the amount advanced as aforesaid together with the Railway freight, cartage, godown rent and insurance charges and interest thereon at 9 per cent. per annum. The plaintiffs further required the defendants to fulfill the said contract by delivery of proper goods under the same. The defendants by their letter of 21st August denied that they were bound to pay the various charges mentioned in the plaintiffs' letter and offered to pay only the amount advanced and the Railway freight paid by the defendants. The plaintiffs by their reply of 22nd August 1918 informed the defendants that according to the usage of trade in Bombay the defendants were bound to pay the charges as well as interest. The plaintiffs also informed the defendants that unless the defendants delivered other goods under the contract the plaintiffs would proceed to buy the same in the market at defendant's risk and hold them liable for the difference.

On 23rd August 1918, the plaintiffs bought 49 tons of wheat of the quality and description mentioned in the contract at Rs. 70-3-0 per candy on account and at the risk of the defendants and claimed from the defendants

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Rs. 2,250-15-0 being the difference between the contract price and the price paid by the plaintiffs. On failure of the defendants to pay the said amount the plaintiffs sued them on the contract for Rs. 2,250-15-0 as loss caused to them by the defendants' default, or as damages for non-performance on the part of the defendants of the contract entered into between the parties. The plaintiffs claimed interest on the said amount.

The defendants without prejudice to their contention that there was a proper tender of goods, contended that the plaintiffs were not entitled to anything more than the difference between the contract rate and the market rate on the due date and that on the due date which was 1st of July 1918 there was no difference between the two rates. The suit came on for hearing before his Lordship, Kajiji J. who decreed the plaintiffs' claim, holding that as there was an attempted performance of contract the date of the breach must be taken as of the date when the parties actually found that the goods tendered were not of the contract quality. The learned Judge delivered the following judgment :—

KAJIJI, J. :—By a contract dated 9th May 1918, the plaintiffs agreed to purchase from the defendants 50 tons of wheat at a particular rate mentioned in the contract, Exhibit A, the delivery being May-June 1918. The defendants tendered the contract goods by giving three Railway receipts within the time mentioned in the contract. Subsequently the Railway receipts were exchanged for the Railway delivery orders and it appears that the plaintiffs actually got the delivery of the wheat on the 13th of July 1918. When the plaintiffs got these goods they found that the wheat was not of the contract quality and accordingly they informed one of the partners of the defendants' firm Ghellabhoy that the goods were not of the contract quality and that they should remove the same. The

plaintiffs' partner who has been examined has deposed that he informed the defendants' partner Ghellabhoy of this several times but he tried to prevail upon him to accept the goods at a certain allowance. The plaintiffs did not agree and actually the parties agreed by a letter of the 3rd of August 1918 from the defendants, to refer the matter to two surveyors, one appointed by each The surveyors made a Report on the 15th of August 1918, and according to the Report they gave an option to the buyer to reject all the goods and the plaintiffs exercised that option and rejected the goods and asked the defendants to remove the same.

Now the suit being one for damages the defendants, contend that on the true construction of the contract the date of the breach was the last day in June or 1st day of July 1918 and that therefore the damages should be assessed as of that date, whilst, on the other hand, it is contended that in a case like the present where a tender is made, i. e., the contract is pretended to be performed by delivering the contract goods, the breach ought not to be as of the last day of the delivery mentioned in the contract but the date on which they actually found that the alleged tender was not of the contract quality. It is agreed on both sides that where there was no performance of the contract at all, the breach would be on the 1st day of July 1918. In this particular case if the defendants had not attempted to perform the contract by tendering delivery of wheat then of course the breech would be on the 1st day of July 1918 but where they have attempted to perform it by tendering the Railway receipts then the question arises whether the date of the breach is the 1st of July 1918 or the date when the parties actually found that the goods tendered were not of the contract quality. From the common sense point of view in a case like the one before me the date of breach could only be on the day

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when the parties actually found that the tender was not of the contract quality. It is too absurd to argue that on the 1st day of July 1918, the plaintiffs could have found out from the Railway receipts by which the goods were tendered that the bags of wheat really contained goods of the contract quality or not. How could the plaintiffs have found out from the Railway receipts that the bags to be taken delivery of later on contained wheat of the contract quality or not ? In my opinion, therefore, in a case like the present where there is an attempted performance of the contract the date of the breach must be taken as of the date when the parties actually found that the goods tendered were not of the contract quality.

The next question is, whether the plaintiffs are guilty of unnecessary or unreasonable dealy in finding out that the goods supplied were not of the contract quality ? The goods were actually received by the plaintiffs on the 13th July 1918 and the plaintiff's partner has not been cross-examined by Mr. Campbell whether he delayed in any way in submitting the matter to the scrutiny of the surveyors or whether there was any delay on the plaintiffs' part in writing the letter of the 20th of August 1918. The plaintiffs' partner has sworn that he wrote that letter on the very day he got the report or a day later and he purported to purchase goods in the market on the 23rd August 1918. In commercial causes a week's time has usually been allowed as a reasonable time to purchase goods, and, therefore, the plaintiffs have not been guilty of any delay in purchasing the goods, on the 23rd August 1918. Therefore, the date of the breach is the date when they actually found out the quality of the goods, because prior to that the plaintiffs could not have found out that the tender was a bad one nor could they have bought the goods in the bazar without knowing the exact quality of the goods tendered.

The defendants had use of these monies and in general law they are bound to pay interest on these monies, therefore they will have to pay interest at 6 per cent. on the amount they had used. As for insurance charges and godown rent, the plaintiffs have given them up.

There will, therefore, be a decree for the plaintiffs for Rs. 2,250-15-0 and for the defendants for the amount claimed for the godown rent and insurance charges. Costs and interest on judgment at 6 per cent. till payment.

The defendants appealed.

Inverarity and *Campbell*, for the appellants.

Strangman, Advocate-General and *Desai*, for the respondents.

MACLEOD, C. J. :—The plaintiffs filed this suit against the defendants to recover damages for the breach of a a contract, dated the 9th May 1918, whereby the defendants agreed to sell to the plaintiffs and the plaintiffs agreed to buy from the defendants 50 tons of Yellow Katha wheat at Rs. 8-2-0 per cwt. on the terms and conditions mentioned in the contract. Delivery was to be May-June 1918 at the sellers' option. Therefore the last day for delivery was the 30th day of June 1918. The Railway receipts relating to the contract goods were handed over to the plaintiffs within the contract time. The plaintiffs took delivery and warehoused the goods about the 13th of July 1918. Thereafter, on examining the goods the plaintiffs were dissatisfied with their quality and contended that they were not a proper and fair tender against the contract. Eventually a survey was held and the plaintiffs rejected the goods. The plaintiffs, on the 23rd of August 1918, bought 49 tons of wheat of the quality and description mentioned in the contract and they claim to

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recover the difference between what they paid for these 49 tons and the contract price. They also claim interest on the amount awarded.

The learned trial Judge found that there had been a breach of the contract and considered the question whether the date of the breach was the 1st of July 1918 or the date when the parties actually found that the goods tendered were not of the contract quality, and came to the conclusion that where there was an attempted performance of the contract the date of the breach must be taken as of the date when the parties actually found that the goods tendered were not of the contract quality. He found that there was no delay on plaintiffs' part to buy against the sellers, and he passed a decree in favour of the plaintiffs for Rs. 2,250-15-0. The learned Judge also seems to have allowed interest on the amount which the plaintiffs had paid for the goods from the date that the money was paid until it was returned by the defendants.

This is an ordinary case of breach of contract to deliver goods which were contracted for to be delivered at a future date. The general rule is that if there is a breach of the contract the measure of damages is the difference between the contract rate and the market rate at the date of the breach. The date of the breach must be considered as that date when the seller ought to have tendered goods of the contract quality and failed to do so. It must follow that if the buyer is dissatisfied with the quality of the goods tendered and demands a survey, some time must elapse before a survey is held and a decision is given as to the quality of the goods; but that does not postpone the date of the breach. It must be the due date unless the parties come to an agreement that the due date shall be postponed until it is ascertained whether the goods are of the contract quality or not. In this case there is no evidence whatever of any

such agreement. The ordinary course of events followed after the buyers claimed to reject the goods on the ground that the goods tendered were not of the contract quality. The plaintiffs have failed to prove that the due date must not be taken to be the date of the breach, and they have not proved that there was any difference between the contract rate and the market value at the due date. Therefore, they failed to prove that they suffered any damage owing to the goods not being of the contract quality.

The appeal, therefore, must be allowed and the plaintiffs' suit dismissed with costs throughout.

HEATON, J. :—I agree. It is conceded that unless the date was postponed, the due date of the contract must be taken as the determining point for calculating the price which is to be taken in assessing damages. That being conceded, it is unnecessary to consider whether any other method of arriving at the damages ought to be taken. The method is conceded. It is only a question of date. A postponement of the date, which is what the plaintiffs allege occurred, could be proved in two ways. It could be proved by an explicit agreement to postpone the date. But of that there is no trace in this case. It could also be proved by an implied agreement, an implication arising out of the conduct of the parties. But as the conduct of the parties in this case was normal conduct, as the proceedings followed the ordinary course, it is impossible to infer an implied contract from the course of conduct. Because it is well understood that where the conduct of the parties follows a normal line the date for the purpose of ascertaining the price and calculating damages is the date of the breach of the contract. That in this case was the 1st of July 1918. No actual damages are proved. No damages are due if the ordinary rule be

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applied. That rule must be applied. So the suit fails and the appeal must be allowed. I agree to the order proposed.

Solicitors for the appellants: Messrs. *Payne & Co.*

Solicitors for the respondents: Messrs. *Bhaishankar, Kanga & Girdharlal.*

Appeal allowed.

G. G. N.

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

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February 25.

KUMAR SHRI RANJITSINHJI, PLAINTIFF *v.* THE BANK OF BOMBAY, DEFENDANTS.*

Presidency Banks Act (XI of 1876), section 23—Succession Certificate Act (VII of 1889), sections 16 and 17—Dividends on shares may be paid to the person obtaining succession certificate—Transfer of shares to the holder of certificate or his nominee—Case stated for opinion of Court—Civil Procedure Code, Act (V of 1908), section 90 and Order XXXVI.

The provisions of section 23 of the Presidency Banks Act of 1876 do not prevent the Banks from accepting the succession certificate granted under the Succession Certificate Act. The certificate affords full indemnity to all the persons who are liable on the securities specified in the certificate as regards all dealings in good faith in respect of such securities.

Held accordingly, the Banks will not be contravening the provisions of the Act if they pay the dividends on the shares in the Banks to the person obtaining the certificate, and on his requisition transfer the said shares to him or his nominee.

CASE stated for the opinion of the Court under Civil Procedure Code, Act V of 1908, section 90 and Order XXXVI.

Maharaj Rajkumar Shri Raghunathsinhji Wakhatsinhji of Lunawada died intestate at Lunawada on

* O. C. J. Suit No. 243 of 1920.