

As regards the precise order to be made, we will give Mr. Dunne's client a week to consider whether, under the circumstances, he thinks it worth while to have a reference to title, the present appellant not objecting to such reference if the other side so desire.

We will deal with the question of costs after Mr. Dunne's client has decided what he will do.

STEVENS, J. I concur.

SALE, J. In assenting to the order which the learned Chief Justice proposes to make in this matter, I wish to say that I entirely agree with the view which has been taken as regards the operation of condition 7 of the conditions of sale. I agree that it does not operate so as to preclude the purchaser from raising a question as regards misrepresentation after the period mentioned in the condition for raising objections to the abstract of title. I also agree, that sitting here as a Court of Equity, we ought not in a case where there has been admittedly serious misrepresentation as regards a material document of title, to hold the purchaser to his bargain without a previous reference as to title.

[At the expiration of a week their Lordships made the following order:—]

MACLEAN, C. J. This case stood over for a week to give Mr. Dunne's clients an opportunity of saying whether they desired to have a reference to title. Mr. Dunne tells us this morning, that they do not ask for such a reference, and I think they are wise in the conclusion they have come to.

The result, then, will be that there will be an order for the return of the purchase-money to the appellant, and the appellant, [476] the purchaser will have his costs of this appeal and in the Lower Court.

SALE, J. I concur.

STEVENS, J. I concur.

Attorney for the appellant: *Bepin Behari Banerjee*.

Attorney for the respondent: *G. C. Chunder*.

30 C. 477 (=7 C. W. N. 431).

[477] ORIGINAL CIVIL.

MACKERTICH v. NOBO COOMAR RAY.* [20th February, 1903.]

Contract—Breach of contract—Damages, measure of—Delivery, specific period for—Seller's option—Notice of inability to perform contract.

If a vendor has any specific period of time allowed to him to deliver goods, and before the time has elapsed gives notice to the purchaser that he will be unable to complete the delivery, the purchaser not rescinding the contract, the measure of damages is the difference between the contract price and the price of the subject-matter on the last day of the period within which the delivery ought to have been made.

The terms "shipment at seller's option during August-September" in a contract do not mean that the seller has an optional period of two separate months in which he can deliver, but they refer merely to the character of the delivery.

Leigh v. Paterson (1) referred to.

ORIGINAL SUIT.

The plaintiff contracted to buy from the defendant and the defendant contracted to sell to the plaintiff, by bought and sold notes, dated the 19th July 1889, 2,000 *kutch*a bales of jute of a particular quality at

* Original Civil Suit No. 776 of 1901.

(1) (1818) 8 Taunt, 540.

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APPEAL
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Rs. 4-12 per bazar maund, and by another contract entered into on the same date, another quantity of 1,000 *kutch*a bales of jute of another quality at Rs. 4-4 per maund. Shipment was to be at the seller's option during 'August-September,' and the jute was to be delivered by the defendant at Watson's Press at Calcutta. Some time in the month of August the defendant gave notice to the plaintiff of his inability to perform the contract, but the plaintiff did not consent to the contract being rescinded. The plaintiff sued the defendant to recover damages for breach of contract. The defendant admitted the contract and the breach thereof.

[478] Mr. *Sinha* for the plaintiff. If the goods were despatched from the defendant's place of business on the last day of the period within which the delivery was to have been made, *i.e.*, the 30th of September, they would have arrived at Watson's Press, the place of delivery mentioned in the contract, on the 6th of October. The measure of damages should therefore be the difference between the price at the contract rate and that at the market rate on the 6th October.

Mr. *S. B. Das* for the defendant. The period of time allowed to the vendor for making delivery was an optional period of two separate months in which he could deliver, and since he gave notice, sometime in August, of his inability to perform, the measure of damages should be the difference between the price at the contract rate and that at the market rate on the 31st August.

AMBER ALI, J. This is a suit for damages brought under the following circumstances.

The plaintiff, who is a merchant and dealer in jute and carries on business in Calcutta, contracted to buy from the defendant and the defendant contracted to sell to the plaintiff, by bought and sold notes, dated the 19th July 1899, 2,000 *kutch*a bales of certain jute at Rs. 4-12 per bazar maund. By another contract entered into on the same date, the plaintiff agreed to purchase and the defendant agreed to sell to the plaintiff another quantity of 1,000 *kutch*a bales of the same kind of jute, delivery or shipment was to be, at the seller's option, during 'August-September.' In the month of August the defendant gave notice to the plaintiff, of his inability to perform the contract. It is quite clear that the plaintiff on receiving the notice was under no obligation to go into the market to buy the goods, nor could the contract be rescinded without the consent of the plaintiff.

No delivery having been made in terms of the contract, the plaintiff, sometime in October, bought the quantity of jute which had been contracted for, and now claims the difference between the market rate prevailing on the 6th of October, and the contract price.

The defendant's contention is that the plaintiff is entitled to damages on the basis of the market rate prevailing on the 31st of [479] August and no further. This contention has been formulated by his counsel in this way. The defendant had the option of making shipment or delivery either in August or September, as it was open to him to make shipment in either of these months; he having given notice in August, the damages ought to be calculated on the basis of the market rate at the end of August; had he given notice in September, it would have been calculated at the market rate prevailing at the end of September. The argument is extremely ingenious. No authority, however, has been brought to my notice in support of the contention.

The text in Addison on Contracts based on the case of *Leigh v. Paterson* (1) is perfectly clear. In Addison the principle is thus stated:—
 "If the vendor has a month or any specific period of time allowed to him for making the delivery, and finds before the time has elapsed that he will be unable to complete the delivery, and gives notice to the purchaser that he refuses to proceed therewith, and the price rises, the measure of damages is the difference between the contract price and the higher price of the subject-matter on the last day of the period within which the delivery ought to have been made." In *Leigh v. Paterson* (1) the marginal note is as follows:—"If a vendor has time until a given day to deliver goods, and on a prior day, when the prices are low, he refuses to proceed with the contract, after which the price rises, the purchaser, not rescinding, is entitled to recover the difference between the contract price and the higher price which the goods bear on the last day appointed for the fulfilment of the contract."

Mr. Das argues that the period of time allowed to the vendor in the present case, for making delivery, was not a continuous period, but an optional period of two separate months in which he could deliver. To my mind, it is a matter of indifference whether he has two months or one month for the purpose of fulfilling the contract. There is no doubt a difference between the use of the word "and" and the use of the word "or" in connection with the two months. The difference is only as regards the character of the delivery; for example, if the condition had been this delivery to be in "August and September," it would have [480] implied that the goods might be delivered in instalments throughout that period, the whole contract to be completed in these two months, viz., August and September. But where the expression is "August or September," in that case the whole contract might at the seller's option be completed in either of these two months. The option given to the seller to fulfil the contract either in August or September does not alter his liability for fulfilment of the contract. He had the whole of two months for the purpose of making delivery and fulfilling the contract. The measure of damages must be the market rate on 30th September.

I do not agree with the contention of the learned counsel for the plaintiff that the measure of damages is to be taken at the market rate on the 6th of October. The condition as to price "per Calcutta bazar maund, the actual gross weight delivered at Watson's Press" refers, in my opinion, to the maundage on which the price was calculated, and not as to the term of delivery which is provided for separately at the bottom of the bought note.

I therefore refer the matter to the Official Referee, to find the market rate on the 30th of September, and assess damages on the basis of the difference between the contract rate and the market rate prevailing on that date.

[Mr. *Sinha*. I ask for costs of suit.

Mr. *Das*. I would ask your Lordship to reserve the question of costs at present, for there may not be any damages.]

I will reserve the costs.

Attorneys for the plaintiff: *Leslie and Hinds*.

Attorney for the defendant: *A. K. Guha*.

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(1) (1818) 8 Taunt 540.