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trol the literal meaning of the words; and the argument that the words having been suggested by the plaintiffs must be taken as intended solely for their benefit seems to me to be fallacious. The fact (if it were a fact) that the clause had been inserted at the request of the plaintiffs could not alter its meaning, or relieve the plaintiffs from any obligation which the terms of the contract literally construed would impose upon him.

I, therefore, concur in thinking that the appeal should be dismissed with costs.

Appeal dismissed.

Attorneys for the appellant: Messrs. *Roberts, Morgan, & Co.*

Attorneys for the respondent: Messrs. *Pittar & Wheeler.*

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

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July 22.

SOOLTAN CHUND AND OTHERS (DEFENDANTS) *v.* SCHILLER AND OTHERS (PLAINTIFFS).

Contract—Right to Rescind—Time of the Essence of the Contract—Reciprocity of Obligation—Contract Act (IX of 1872*), ss.* 39, 51, 55.

Section 39 of the Contract Act only enacts what was the law in England and in India before the Act was passed,—namely, that where a party to a contract refuses altogether to perform, or is disabled from performing, his part of it, the other party has a right to rescind.

In a suit for damages for the non-delivery of linseed upon a contract the terms of which as to payment were cash on delivery, part delivery had been made by the defendant, and a sum of Rs. 1,000 had been paid on account by the plaintiffs. The plaintiffs then made a claim against the defendants for excess refraction, and the defendants thereupon refused to deliver the remainder of the linseed unless the plaintiffs paid the full amount owing for the portion that had been delivered. The plaintiffs declined to accept these terms, and the defendants then cancelled the contract.

Held, that there was not such a refusal on the part of the plaintiffs to perform their part of the contract as to entitle the defendants to rescind under s. 39 of the Contract Act.

Held by GARTH, C. J., that s. 51 of the Act was not applicable, inasmuch as it did not appear that the plaintiffs were unwilling to pay for the deliveries which the defendant refused to make, and that time was not of the essence of the contract so as to bring the case within the provision of s. 55 of the Act.

Held by MARKBY, J., that s. 51 would have applied if the defendants, when they came to make delivery, had insisted upon the contract being strictly

performed and upon payment being made on delivery, and that if the defendants had so insisted, time might have been of the essence of the contract within the meaning of s. 55.

APPEAL from a decision of Pontifex, J.

This was a suit brought to recover damages for the non-delivery of a quantity of linseed by the defendants pursuant to contract. The contract was to deliver 200 tons of linseed at a certain price. Delivery in all April and May at the Howrah railway station. Refraction not to exceed 4 per cent., with the usual allowance up to 6 per cent., and the terms as to payment were cash on delivery. It appeared that, between the 1st and 8th May, certain deliveries were made by the defendants; and that a sum of Rs. 1,000 was paid on account by the plaintiffs. This left a large balance due to the defendants, and as this balance was not paid, the defendants refused to deliver the remainder of the linseed. The refusal was contained in a letter of the 12th May, in which the defendants' attorneys wrote as follows:—

"We are instructed to give you notice, that as you have failed to pay the price of linseed delivered under Mr. Beer's contract in terms of the said contract, they (our clients) hereby cancel the said contract, and will make no further deliveries under it."

The plaintiffs answered, that they considered that the whole 200 tons should have been delivered before the defendants were entitled to demand payment; but they added, that they were quite willing to waive that objection on adjustment of a sum which they claimed for excess refraction, and an allowance for some empty bags which they said had been used by the defendants for purposes unconnected with the contract.

Further correspondence ensued, but the defendants insisted to the last, that on account of the non-payment by the plaintiffs of balance due, they would make no further delivery.

The plaintiffs, accordingly, bought in other linseed against the defendants, and then brought the present suit for the loss which they had sustained.

The learned Judge in the Court below decided that the defendants had no right to cancel the contract, and gave the plaintiffs a decree for Rs. 3,088-5.

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Mr. *Bonnerjee* for the appellants.—The question depends on the construction of the contract and what the parties were bound to do under it. All questions as to quality should have been settled at the time of delivery—*Withers* v *Reynolds* (1). [GARTH, C. J.—That case is against you. The mere refusal to pay on one delivery is not enough to entitle you to rescind the contract; the refusal must be an entire refusal to pay for any part on delivery.] Here the plaintiffs say they will not pay. All that they were entitled to do before taking delivery was to refract, and to ascertain the amount of damages. I am entitled to say, under s. 39 of the Contract Act, that as the plaintiffs did not perform their part of the contract in its entirety, the defendants were entitled to repudiate it—*Freeth* v. *Burr* (2). The plaintiffs had no right to ask for adjustment; they had no right to take goods without payment; there were reciprocal promises, and as the plaintiffs were not ready and willing to perform their promise, the defendants were not bound to perform theirs: Contract Act, s. 51. [GARTH, C. J.—You need not have delivered, unless the plaintiffs were ready and willing to pay. You say, that if you were not paid upon delivery, you have the right to rescind.] They committed a breach by not paying. [GARTH, C. J.—If s. 51 applies at all it applies only to each separate transaction. If you found that the plaintiffs were not ready and willing to pay, you were not bound to deliver. But if you delivered, you performed your reciprocal part of the contract, and could sue for the price, but had no right to rescind.] The plaintiffs committed a breach; having done so they cannot now sue for damages. They are bound to show that they endeavoured to carry out their part of the contract. Under the terms of the contract, the plaintiffs being bound to pay on delivery, the non-payment upon any particular delivery was a breach. They do not carry out the contract in its entirety. [GARTH, C. J.—Refusal to perform a contract in its entirety means an absolute refusal; the non-performance of part does not give a right to rescind.] The contract must be taken as a whole, and if any part is not performed, the contract is

(1) 2 B. & Ad., 882. (2) L. R., 9 C. P., 208.

at an end. The learned Judge in the Court below relied upon s. 55 of the Contract Act; that section is in favour of appellants' contention. In cases of this kind time is of the essence of the contract. Here there was a rising market. The learned Counsel referred to *Hoare* v. *Rennie* (1) and *Simpson* v. *Crippin* (2).

Mr. *Jackson* and Mr. *Stokoe* for the respondents were not called upon.

The following judgments were delivered

GARTH, C. J. (after stating the facts of the case, continued as follows):—The defendants have appealed, and the amount of damages not being disputed, we have only to consider whether the defendants were justified in cancelling the contract. The defendants rely on the provisions of ss. 39 and 51 of the Indian Contract Act of 1872. Under s. 39 they say, that the plaintiffs not having paid for the goods on delivery, they have refused to perform the contract in its entirety; and that the defendants had, therefore, a right to cancel it. This is not my view of the proper construction of s. 39.

That section, as I understand it, only means to enact what was the law in England, and the law here, before the Act was passed,—*viz.*, that where a party to a contract refuses altogether to perform, or is disabled from performing, his part of it, the other side has a right to rescind it.

This rule will be found explained in the notes to *Cutter* v. *Powell* (3). The case of *Freeth* v. *Burr* (4) is one which is very apposite to the present, and which illustrates the principle of s. 39 very clearly. The defendants there had contracted to sell to the plaintiffs 250 tons of pig iron, half to be delivered in two, and the remainder in four, weeks; payment to be made fourteen days after delivery of each parcel. The payment for the first parcel was not made for six months, and the defendants did not deliver the second parcel, which was deliverable under the contract at the time when the first parcel was to be paid for. The plaintiffs then claimed to set off as against the price of

(1) 5 H. & N., 19.
(2) L. R., 8 Q. B., 14.
(3) 2 Smith's L. C., 1, at p. 12, 7th ed.
(4) L. R., 9 C. P., 208.

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the first parcel the loss which they had sustained by non-delivery of the second parcel. The defendants then refused to deliver the second parcel at all, upon which the plaintiffs bought in other iron against them, and sued them for damages for the non-delivery. The Court held that the defendants were not justified in refusing to complete the contract. The plaintiffs had not refused to pay for the iron. They had only neglected to pay it in proper time, and had tried to set off their losses against the price of the first parcel. And so in the present case the plaintiffs never refused to pay for the linseed delivered: they only made a claim for excess refraction and empty bags; and expressed their willingness to pay when these claims had been adjusted.

Before I leave the subject of s. 39, I ought perhaps to refer to the illustrations in that section, which have been relied upon by the appellant in support of his argument.

Without going into the very serious question, (which I think it is unnecessary to do on the present occasion), as to how far the illustrations, which are now so constantly used, have the effect of controlling or explaining the language of the sections to which they relate, it is sufficient for my present purpose to say that one of the illustrations to s. 39 instances the case of a singer engaged to perform at a theatre several nights, who wilfully absented herself on one night only. This is said to be such a refusal to perform her contract in its entirety, that the manager of the theatre was justified in putting an end to the contract.

It has been urged upon us by the appellants' Counsel, that the default of the singer was only a partial refusal to perform her contract; and that the plaintiffs in this case were equally guilty of a partial refusal to perform theirs.

That illustration is perhaps not a happy one; because it may lead, as I think it has led in this instance, to misapprehension. But the difference between that case and this is clear enough. The singer, by wilfully absenting herself, though on one night only, did in fact refuse altogether to perform an integral and essential part of her contract. By doing so, she put it out of her power to perform her contract in its entirety. But here the plaintiffs have never refused to perform any part of their

contract. They were willing to pay the sum due as soon as their cross claims were adjusted; and their default consisted in not paying for the linseed on delivery.

But then it is argued by the appellants, that s. 51 applies, because the promises to deliver linseed and to pay for it on delivery were reciprocal promises. But in my opinion that section is not applicable here at all. The section says,—that "where 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."

Now, applying that section to the present case, the reciprocal obligations were the delivery of the seed and payment of the money on the occasion of each delivery.

The defendants were bound to deliver, the plaintiffs to pay for, the linseed. If the plaintiffs had been unwilling or unable to pay, the defendants would have been justified in refusing to deliver; but the defendants did deliver the seed; the neglect to pay in this instance was after delivery, when the reciprocity of obligation had ceased; and there is clearly no evidence here that the plaintiffs were unwilling or unable to pay for the deliveries which the defendants refused to make. The neglect to pay for past deliveries was, under the circumstances, no reason for refusing to make all further deliveries.

Then Mr. Bonnerjee argues, that (under s. 55) instant payment was so essential that the failure of the plaintiffs to pay for the past deliveries at the moment of delivery, justified the defendants in cancelling the contract.

This argument is not only quite inconsistent with the conduct of the parties in this particular case, but contrary to the known course of dealing in all mercantile contracts of the kind. It involves the supposition that instant payment of the price on each delivery was of the essence of the contract, and that, unless the plaintiffs paid their money down at once upon each delivery, the defendants were at liberty to cancel the contract. Now it must be borne in mind, that the defendants made several deliveries in this case without asking for money at all: and that when money was paid by the plaintiffs it was paid in a lump sum on account.

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There is nothing, as it seems to me, in this contention, and on the whole I think the appeal should be dismissed with costs.

MARKBY, J.—I also think that the appeal must be dismissed with costs. I agree that the question before us must be determined in accordance with the Contract Act. I also agree with the learned Judge of the Court below, that s. 39, whatever it may mean, is not applicable to a mercantile contract of this description. I think that s. 51 would apply if the defendants, when they came to make delivery, had insisted upon the contract being strictly performed and payment being made on delivery; but this they did not do. With regard to s. 55, in one sense it might be said that time was of the essence of the contract, because the defendants had a right to insist upon immediate payment on delivery. But, as I have said, they did not insist upon this. From the 1st to the 8th of May deliveries were being made, and only one payment was made,—namely, on the 5th May, of Rs. 1,000, and it is not asserted that payment strictly on delivery was ever demanded. As to the earlier deliveries, therefore, the defendants could not, in my opinion, now assert that time was of the essence of the contract, and that payment not having been made strictly on delivery, the plaintiffs had broken their contract, and so absolved the defendants from any further performance of it. If the plaintiffs had ever said they would not pay the balance due for deliveries already made, or that they would not pay on delivery for future deliveries, the case would have been different. But they never said that. There was a dispute as to the balance due on past deliveries, but there was no doubt that, on this dispute being settled, the balance would have been paid; and there was also no doubt that future deliveries would have been paid for, if demanded, according to the contract.

Under these circumstances the defendants cannot say that the failure to pay on delivery strictly in accordance with the contract justified them in refusing to go on with it.

Appeal dismissed.

Attorneys for the appellants: Messrs. *Pittar* and *Wheeler*.

Attorneys for the respondents: Messrs. *Roberts, Morgan, & Co.*