

## SMALL CAUSE COURT REFERENCE.

*Before Sir William Comer Petheram, Kt., Chief Justice, Mr. Justice Norris, and Mr. Justice O'Kinealy.*

RAMDEO AND ANOTHER v. CASSIM MAMOOJEE.\*

1893  
*February 16.*

*Contract—Delivery order for goods deliverable monthly—Sub-contract—Tender—Repudiation of contract.*

The defendant entered into a contract with the Union Mills for the purchase of "90,000 gunny bags at Rs. 21-8 per 100 bags, delivery from October to March, each month 15,000 bags." Subsequently the defendant contracted to sell to the plaintiffs these 90,000 bags "at Rs. 24-2 per 100 bags, delivery from October to March, 15,000 each month, buyers to pay difference cash against delivery order on Mills." In August the defendant made out in the plaintiffs' favour a delivery order directing the mills to deliver 90,000 bags on receiving payment for the same at Rs. 21-8 per 100 bags, and on the same day sent to the plaintiffs a bill showing the amount of difference payable to him by them. The plaintiffs refused the delivery order on the ground that it had not been accepted by the mills; but on a subsequent tender of the order and bill, they offered, on the 5th September, to pay the amount of difference on receiving a delivery order accepted by the mills. The defendant treated the contract as at end and sold the bags in the market. In a suit for damages, *held*, that the defendant sold not only a delivery order, but the right to obtain from the mills 90,000 bags, deliverable in lots of 15,000 per month after payment of the difference; and impliedly undertook that the mills would accept the delivery order and deliver the goods in terms thereof when presented; that the plaintiffs were entitled to get the delivery order at any reasonable time before the first monthly instalment fell due; and further, that the defendant was not entitled to repudiate the contract after the plaintiffs' offer of the 5th September, and having done so was liable in damages.

REFERENCE to the High Court under section 69 of Act XV of 1882 and section 617 of Act XIV of 1882.

The suit was one for damages amounting to Rs. 1,181-4 by reason of the defendant having failed to deliver to the plaintiffs 15,000 A. twill gunny bags in the month of January 1892, under a contract dated the 28th August 1891.

\* Small Cause Court Reference, No. 4 of 1892, by G. C. Sconce, Esq., Chief Judge of the Calcutta Court of Small Causes.

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On the 28th August 1891 the plaintiffs and defendant entered into a contract by bought and sold notes, by which the plaintiffs bought, and the defendant sold, 90,000 A twill gunny bags 44 × 26½, Union Mills make, at Rs. 24-2 per 100 bags—Terms, cash on delivery, which was to be given and taken from October 1891 to March 1892, each month 15,000 bags.

The defendant had previously, on the 19th June 1891, entered into a similar contract, through Messrs. Stavridi and Company, with the Union Mills, for the purchase from them of 90,000 A twills, at Rs. 21-8 per 100 bags, delivery 15,000 bags per month, from October 1891 to March 1892. The bought and sold notes between the plaintiffs and the defendant therefore contained a further clause, “buyers to pay difference cash against delivery order on the Mills.”

On the 29th August 1891 the defendant made out a delivery order in favour of the plaintiffs, directing the Mills to deliver to the plaintiffs 90,000 A twill gunny bags 44 × 26½, on receiving payment for the same at Rs. 21-8 per 100 bags. On the same day the defendant made out a bill of difference against the plaintiffs for the sum of Rs. 2,362-8, being the amount of difference on the value of the 90,000 bags, at Rs. 2-10 per 100 bags, between Rs. 24-2, the price at which the plaintiffs bought from the defendant, and Rs. 21-8, the price at which the defendant had bought from the Mills.

The defendant having previously tendered the delivery order and the bill to the plaintiffs, on the 4th September sent them a letter calling upon them to pay Rs. 2,362-8 by the next day, and stating that in default of such payment being made, he would sell the delivery order on the plaintiffs' account and hold them liable for any loss sustained.

On the 5th September the plaintiffs by letter of that date refused the delivery order and bill on the ground that the delivery order had not been accepted by the Mills, and at the same time offered to pay the amount of the difference on receiving a delivery order accepted by the Mills.

The defendant did not sell the delivery order, but disposed of the bags in different quantities at different times.

On the 9th September 1891 the plaintiffs wrote to the defendant tendering Rs. 2,362-8, and requested that the delivery order should be made over to them. The defendant, however, refused to comply with this request. Subsequently, and at the end of each month from October 1891 to March 1892, the plaintiffs tendered to the defendant the sum of Rs. 3,468-12, the value of 15,000 bags, at Rs. 23-2 per 100, deliverable during each of these months; and having received neither the delivery order nor the goods, instituted this suit for damages.

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The learned Chief Judge was of opinion that the defendant sold to the plaintiffs not only a delivery order, but his right to obtain from the Mills 90,000 A twill bags deliverable in lots, 15,000 per month, between October 1891 and March 1892, at Rs. 21-8 per 100 bags, after payment by the plaintiffs to the defendant of Rs. 2,362-8 for the delivery order; and that the defendant was not bound by the terms of the contract to tender a "puoka" delivery order, *i.e.*, a delivery order showing on the face of it that it had been accepted by the Mills, but that he impliedly undertook that the Mills should accept the delivery order and deliver the goods in terms thereof when presented by the plaintiffs to the Mills; and that by the terms of the contract the defendant was not bound to tender the delivery order "at once" to the plaintiffs, nor were the latter bound to receive it "at once," but were entitled to get the delivery order at any reasonable time before the first monthly delivery of the goods became due; and that although the plaintiffs were not justified in objecting, as they did at first, to the delivery order on the ground that it did not purport to have been accepted by the Mills, yet when on the 9th September they tendered to the defendant the amount of the difference bill and asked for the delivery order, the defendant should have given it to them; and that the plaintiffs, having received neither the delivery order nor the goods, were entitled to a decree for the amount claimed.

The learned Judge, however, at the request of the defendant's Counsel, made his judgment contingent on the opinion of the High Court, as to whether the plaintiffs' first refusal of the delivery order and their letter of the 5th September 1891 entitled the defendant to rescind the contract.

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Mr. *Henderson*, for the defendant, contended that the defendant only sold a delivery order; that it was not a condition precedent that the delivery order should be first accepted by the Mills; that it was no good ground of objection that the order tendered to the plaintiffs was a "kutchra" order, *i.e.*, not one on the face of it accepted by the Mills; and that, the plaintiffs having at first refused the order, the defendant was justified in cancelling the contract; that the subsequent tender on the 9th September by the plaintiffs to the defendant of Rs. 2,362-8 for the delivery order was too late.

Mr. *T. A. Apear* for the plaintiffs.

The judgment of the Court (*PETHERAM, C.J., NORRIS and O'KINEALY, JJ.*) was delivered by

*PETHERAM, C.J.*—The question which we are asked in this case is, whether or not the plaintiffs' first refusal of the delivery order and their letter of the 5th September 1891 entitled the defendant to rescind the contract. In my opinion the answer to that question is, that it did not so entitle him. The facts of the case are fully set out in the reference of the learned Small Cause Court Judge; and, therefore, it is not necessary to recapitulate them here. It is sufficient to say that I agree with the Small Cause Court Judge in thinking that upon this contract the defendant had no right to call upon the plaintiffs to accept the delivery order of the whole of the goods at that time. In addition to that, I do not think that the letter of the plaintiffs was such repudiation of the contract as to entitle the other party to say that it was at an end. I think the Small Cause Court Judge was right in the view he has taken of the case. This answer will be sent to the Small Cause Court.

Attorney for plaintiffs: Mr. *Pittar*.

Attorney for defendant: Babu *N. C. Bural*.