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any expert of the plaintiff that they should not go further; the cracks and openings in the walls and excavations made by the defendant to inspect the foundations to be put right at once at the defendant's expense, and the costs of the expert employed by the plaintiff to be paid by the defendant.

Costs of this application will be costs in the cause.

Attorneys for the plaintiff: Messrs. *Remfry & Rose.*

Attorney for the defendant: Babu *B. N. Bose.*

F. K. D.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep and Mr. Justice Pigot.

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A. YULE & Co. *v.* MAHOMED HOSSAIN AND OTHERS.[a]

Contract—Sale of unascertained goods—Appropriation by vendor—Passing of property—Breach of Contract—Power of resale—Contract Act (IX of 1872), section 107—Measure of damages.

The contract was for sale by description of 15 bales of grey shirtings (to arrive) at an agreed price. It was found that the 15 bales which were tendered by the plaintiff did answer the description, but the defendants refused to accept them, alleging that they were wrongly marked. Under the contract of sale the plaintiffs had an express power of re-sale. After giving notice to the defendants they had the goods re-sold at auction and bought them in themselves as the highest bidders. Then they brought an action for the difference between the contract price and the price realized at the re-sale, framing the suit as for loss on re-sale, and not for damages for breach of the contract.

Held, the defendants having refused to accept the goods, the property in them remained in the vendors (plaintiffs), and the re-sale had no effect whatever. To such a case as this neither section 107 of the Contract Act nor the proviso for re-sale in the contract itself can have any application. Such power is required when the property in the goods has passed to the purchaser subject to the lien of the vendor for the unpaid purchase money. The plaintiffs were entitled to receive only the difference between the market price of the day and the contract price, and that was the true measure of damages.

This was a reference by the Second Judge of the Calcutta

[a] Small Cause Court Reference No. 1 of 1895.

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Small Cause Court under section 69 of the Presidency Small Cause Court Act (XV of 1882) and section 617 of the Civil Procedure Code (Act XIV of 1882).

The facts of the case and the questions referred appear from the following letter of reference :—

"This is a suit to recover the loss sustained on a re-sale of goods sold by the plaintiff to the defendant, and the question referred to the High Court seems to me to be briefly this : Can a vendor exercising his power of sale buy the goods himself at a public auction duly advertized, the whole transaction being perfectly open and *bonâ fide?*

"The facts are these : The plaintiff by a contract, dated the 20th October 1893, sold to the defendant 15 bales (to arrive) of grey shirtings at Rs. 4-11 per piece. The 15 bales arrived, and were appropriated to the defendant, but the defendant refused to take delivery, alleging that the goods were wrongly marked.

"The plaintiff gave notice of re-sale on the 11th July 1894, and instructed Messrs. Mackenzie Lyall and Co. on the 16th July to sell 15 bales, specifying the numbers of 13 only out of the 15 bales appropriated to the defendants, the numbers of 2 other bales being excluded apparently by mistake.

"The sale was duly advertized every day for a week and the bales were sold at public auction on the 23rd July by Mackenzie Lyall and Co. at their usual sale of piece-goods to the plaintiff, who was the highest bidder amongst several bidders, at Rs. 4-4-3 per piece, on account of and at the risk of the defendant.

"The plaintiff under the contract for sale had an express power of re-sale in the following words : If they (the goods) are not taken delivery of and paid for as herein agreed, the sellers may re-sell them, or any portion of them, or at their option cancel this contract, and they have absolute discretion as to when and how to re-sell the goods. The buyers, in case of any re-sale, shall pay to the sellers any loss or deficiency arising from such re-sale, together with interest at 12 per cent. per annum. Should there, however, be any surplus after payment of the contract price, charges, costs and expense of re-sale, the same shall belong to the sellers.

"I found that the defendant wrongfully refused to take delivery, that the sale to the plaintiff was a good sale and perfectly *bonâ fide*, and I gave a decree to the plaintiff for Rs. 600 as the loss on the 13 bales only, contingent upon the opinion of the High Court upon the points referred.

"No evidence was given as to what the plaintiff did with the goods subsequent to the re-sale. There was no suggestion either that the plaintiff concealed the fact of his being the purchaser or that the price obtained was not a proper price ; but it was contended for the defence upon the authority of

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Buchanan v. *Aydall* (1) that the re-sale was vitiated by the fact of the plaintiff being himself the purchaser, and Mr. Sowton, the defendant's attorney, has submitted the following questions for the opinion of the High Court :—

"1. Have the plaintiffs a right to recover on their plaint before the Court the loss alleged to have been sustained by them at the sale held on the 23rd of July by Mackenzie Lyall and Co. without accounting for what ultimately became of the goods.

"2. Whether in case the plaintiffs have a right to recover, the amount of damages should not be limited to the expenses incurred at the re-sale.

"3. Whether the plaintiffs are entitled to recover any damages at all by reason of their having re-sold only 13 out of the 15 bales.

"As to the 3rd question, it is sufficient to say that the plaintiffs had power to sell a portion only of the goods under the express provision in the contract.

"As to the 2nd question, if the re-sale is bad the plaintiff cannot recover from the defendant the expenses incurred by him in effectuating such re-sale.

"The 1st question really resolves itself into this : Is the sale to the plaintiff a *good re-sale*? For a loss however great incurred by the plaintiff by the ultimate sale of these goods could only possibly enable him to recover the loss sustained upon a former re-sale if such re-sale is held to be bad.

"The case of *Buchanan* v. *Aydall* does not decide that a vendor exercising his power of re-sale can never become the purchaser of the goods himself, and I cannot find any decision to that effect, but it decided that the re-sale could not be upheld under the particular circumstances of the case ; the particular circumstances being that the vendor hurried on the sale with the least possible notice and purchased the goods under another person's name at a price far below the real value of the goods.

"Apart from the wide power of re-sale given to the plaintiff under the contract in this case, the position of a vendor in the exercise of his power of re-sale under section 107 of the Contract Act is not that of a trustee for the vendee, neither does he sell *qua* pawnee, for the whole of the sale proceeds are his, and he would seem to be in a better position than that of an agent for the vendee : see *Lamond* v. *Davall* (2) ; and yet an agent for sale of land even may purchase from his principal if he deals openly with him at arm's length and after a *full disclosure* of all that he knows with respect to the property : *Murphy v. O'Shea* (3).

"For these reasons I think a vendor exercising his right of re-sale may himself become the purchaser of the goods, if (as in this case) he shows that he has

(1) 15 B. L. R., 276.

(2) 9 Q. B., 1030.

(3) 2 L. & J., 422 (425.)

re-sold the goods in the manner best calculated to secure the highest price possible."

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Mr. *C. P. Hill* for the defendants.—The sale to the defendants being a sale of unascertained goods the property in them did not pass on mere appropriation by the vendor, because that appropriation was not assented to by the purchasers: see section 83 of the Contract Act. The property remained and was in the vendor at the time of the alleged re-sale; there was therefore in fact no re-sale: see section 77 of the Contract Act. No suit for loss on re-sale would lie. The action might have been for breach of contract. In such an action the damages would be the difference between the contract price and the market price. If the plaintiff were now allowed to amend his plaint and to treat the suit as one for damages for breach, the plaintiff would still fail on the evidence as it stands, no evidence of market price having been given.

Mr. *R. Allen* for the plaintiffs.—The goods were appropriated to the defendants and the property in them had passed. The re-sale was a valid re-sale. If the suit be treated as one for damages for breach, then the price fetched at the auction sale is good evidence of the market price, and damages may be assessed on that.

The opinion of the High Court (PETHERAM, C. J., PRINSEP, J., and PIGOT J.) was delivered by

PETHERAM, C. J. (PRINSEP, J., concurring).—My answers to the questions are:—

1. The plaintiffs cannot on the plaint before the Court recover the loss alleged by them to have been sustained at the sale held on the 25th July.

2. In an action properly framed the amount of damages would not be limited to the expenses incurred at the sale.

3. In an action properly framed the plaintiffs would not be prevented from recovering damages because they only professed to sell 13 out of the 15 bales.

The case has been entirely misunderstood, and neither of the questions proposed really arises in it at all.

The contract was for the sale of 15 bales of grey shirtings, and would have been satisfied by the delivery of any 15 bales which answer to the description in the contract.

It is found by the Judge that the 15 bales which were tendered

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by the plaintiffs did answer the description, but as they were at once refused by the defendants and were never taken by them into their possession, the property in the goods never passed to the purchasers but remained in the vendors in the same way that it was vested in them before the tender. The case is the simple one of a breach of a contract to accept and pay for goods sold by description at an agreed price in which the measure of the damage is the difference between the contract price and the market price at the time of the breach. As the property in the goods remained in the vendors that which took place at the sale had no effect whatever, as the plaintiffs were merely offering their own goods for sale, and when they were knocked down at their bid, they only bought in their own goods. To such a case as this neither section 107 of the Contract Act nor the proviso for re-sale in the contract itself can have any application, as no such power is required to enable a man to sell his own goods. Such powers are required when the property in the goods has passed to the purchaser subject to the lien of the vendor for the unpaid purchase money, and it is to that class of cases that both the proviso and the section apply.

In the present case the right of the plaintiff was to recover the difference, if any, between the contract price and the market price at the time of the refusal. No such case was made in the plaint or at the hearing, and there is no evidence of the market price unless the fact that a certain price was obtained at the auction can be so treated, but, as Mr. Hill pointed out, that cannot be, as it was not tendered for that purpose and no question as to the market rate was raised.

The proper course in this case would have been to amend the plaint by adding an averment that the market price at the time of the breach was less than the contract price, and by adding a claim for damages on that basis. Then at the trial evidence might have been given of what the market price was at the time when the goods were refused, and the judgment should have been for the difference if any was shown to have existed.

PIGOT, J.—I agree.

Attorneys for the plaintiff : Messrs. *Dignam & Co.*

Attorneys for the defendants : Messrs. *Sowton & Sen.*

S. C. B.