1880

GOVIND CHUNDER GOSWAMI v. RUNGUN-MONEY.

as applications to transfer a case from one board to another, to transfer a case to the bottom of the board, change of attorneys, and so forth. The Legislature did not intend to deal with such applications as this, and I do not think the article applies to this application. Even if the case fell within the article, I do not think I should feel constrained to say that this application should be refused. One may fairly say when the Court allows a suit to be reconstituted, a new right accrues and the limitation runs from that time.

The application is granted in the terms of the petition, that is to say, the suit will be reconstituted as asked for, and will take its place in the reference list.

Application granted.

SMALL CAUSE COURT REFERENCE.

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

1880
July 23.

BULDEO DOSS *v.* HOWE.*

Sale of Goods—Delivery at Certain Date—Rescission of Contract—Vendor's Remedies—Time of Essence of Contract—Contract Act (IX of 1872), *ss.* 55, 107.

In a contract for the sale of ascertained goods, terms cash on delivery, to be given and taken in ten or eleven days, the vendee obtained an extension of the time for the performance of the contract, agreeing to pay godown rent and interest. He took delivery of, and paid for, some of the goods, and subsequently obtained a further extension of time. A small balance remained in the vendors' hands, after giving the vendee credit for the goods taken delivery of, godown rent, and interest. After the expiration of the further time, the vendee tendered the price of the remaining goods, and demanded delivery, when the vendors stated that they had rescinded the contract. In an action for damages for non-delivery, *Held*, that time was of the essence of the contract, and that, under s. 55 of the Contract Act, the vendors were entitled to rescind.

CASE referred from the Calcutta Small Cause Court.

* Case stated for the opinion of the High Court, under s. 7 of Act XXVI of 1864, by H. Millett, Esq., and Baboo Koonjolall Banerjee, Judges of the Calcutta Court of Small Causes.

On the 8th August 1879, the defendants sold fifty chests of shell lac to Messrs. Fornaro Brothers. The contract was by bought and sold notes, and the terms were cash on delivery, which was to be given and taken in ten or eleven days at buyers' option. Messrs. Fornaro Brothers transferred the contract to the plaintiff. At the expiration of the period mentioned for delivery, the defendants, at the request of the plaintiff, extended the time for delivery, the plaintiff agreeing to pay godown rent and interest on the purchase-money. On the 26th of September, the plaintiff took delivery of, and paid for, twenty chests of shell lac, a small balance (not sufficient to cover the price of one chest) remaining in the defendants' hands after deducting the price of the twenty chests, godown rent, and interest, and the following receipt was granted: "Calcutta, 26th September, 1879. Received of Baboo "Buldeo Doss Chutterbhooj, on account of his purchase of fifty "cases shell lac, through Messrs. Fornaro Brothers, the sum of "Rs. 1,130 only." This delivery the learned First Judge found not to be a delivery of part of the goods in progress of the delivery of the whole. On the 4th or 5th October the plaintiff obtained a further extension of time for one week, bringing the period of delivery to the 12th October. On the 25th or 27th of October, the plaintiff tendered the price of the remaining thirty cases to the defendants, and asked for delivery, but the defendants stated that they considered the contract to be at an end. The learned First Judge found, that the sale was of ascertained goods, and being of opinion that, under s. 55 of the Contract Act, the plaintiff could not recover, directed judgment to be entered up for the defendants.

A new trial was subsequently granted and heard before the First and Second Judges, and the case was referred for the opinion of the High Court upon the following question:—"Whether, on the facts as found, the defendants were entitled to refuse delivery of the goods on the 25th or 27th October?" The learned Judges, after stating that, in their opinion, their decision must be based on the Contract Act only, and not on the English law, and referring to the judgment of Couch, C.J., in *Greenwood* v. *Holquette* (1), as an authority for that opinion, held, that this

(1) 12 B. L. R., 42.

was a case in which time was of the essence of the contract, and the defendants had a right to rescind the contract, on the plaintiffs omitting to take delivery within the time allowed. They found that the plaintiff would be entitled to Rs. 637-8 damages, should the opinion of the High Court be in his favour, but contingent on that opinion they gave judgment for the defendants.

Mr. *Agnew* for the plaintiff.

Mr. *R. Allen* for the defendants.

Mr. *Agnew*.—This was a sale of ascertained goods. There has been a part-payment of the price, and a part-delivery; and the property in the goods has, according to both English and Indian law, passed to the plaintiff: *Martindale* v. *Smith* (1); Contract Act, s. 78. The Contract Act gives an unpaid vendor of ascertained goods certain remedies. He has his lien under ss. 95—98 so long as the goods remain in his possession; or he may resell under s. 107, and he would, of course be entitled to sue the vendee for the difference in case of loss on the resale. If the goods are in the course of transit to the purchaser, the vendor may stop them under ss. 99—106. These remedies correspond with the remedies which an unpaid vendor has under the English law. [PONTIFEX, J.—How long is the vendor to keep the goods if the vendee fails to take delivery at the time stipulated?] He must keep them for a reasonable time, and at all events should call upon the vendee to take delivery. The defendants ought to have tendered the goods to the plaintiff, and then, if the plaintiff refused to pay the price, would have been entitled to exercise their rights as unpaid vendors. Default in payment of the price is not such a breach as will entitle a vendor to rescind. In *Martindale* v. *Smith* (1), Lord Denman, C. J., says:—"Having taken time to consider our judgment owing to the doubt excited by a most ingenious argument, whether the vendor has not a right to treat the sale as at an end, and re-invest the property in himself by reason of the vendee's failure to pay the price at the appointed time, we are clearly of opinion that he had no such

(1) 1 Q. B., 389.

right, and that the action" (which was one for trover) "is well brought against him. For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods if they remain in his possession until that price be paid. But that default of payment does not rescind the contract." In *Sooltan Chund* v. *Schiller* (1) it was held, that default in payment of the price did not authorise the vendors to rescind the contract under s. 55. Suppose the goods had been destroyed in any way after the 12th October, and before the plaintiff tendered the price, he would have been liable for the loss, as the property in the goods had passed to him: Contract Act, s. 86; *Shoshi Mohun Pal Chowdry* v. *Nobokrishto Poddar* (2). Section 55 does not apply to the case of a sale of ascertained goods, but to sales of specific chattels conditionally, as where the vendor is to do something to the goods before delivery, or where the goods are to be tested, or weighed, or measured. The thing to be done must be in the nature of a condition precedent—*Simpson* v. *Crippin* (3). But even if s. 55 does apply to a sale of ascertained goods, time was not of the essence of the contract here. In order that time may be of the essence of the contract, it must go to the very root of the consideration, and there must be direct stipulation or necessary implication. The "intention of the parties" must be the intention of both parties, not of one. It clearly was not the intention of the plaintiff that the contract should be at an end, and if he did not pay the price on the 12th October, he had agreed to pay godown rent and interest, and the bargain was an advantageous one for him. Besides he afterwards urged and demanded compliance with the contract, thereby showing that he did not understand it to be at an end. There was a part-payment of the price of the undelivered goods when the twenty chests were taken. Even if the vendors had the right to rescind, they should have given the plaintiff notice of their intention. In rescinding, as in making a contract, both parties must concur: *Franklin* v. *Miller* (4).

(1) I. L. R., 4 Calc., 252.
(2) *Id.*, 801.
(3) L. R., 8 Q. B., 14.
(4) 4 A. and E., 599.

1880

BULDEO DOSS v. HOWE.

Mr. *R. Allen*.—English law cannot be considered in this case. It must be governed by the Contract Act. There is nothing in the Act to show that s. 55 is not to apply to contracts for the sale of ascertained goods, and the section itself is wide enough to include such contracts. The effect of extending the time for delivery was to make it of the essence of the contract, that delivery should be taken not later than the 12th October. The case of *Sooltan Chund* v. *Schiller* (1) does not apply. The contract there was not for the sale of ascertained goods, nor was time of the essence of the contract. The case of *Shoshi Mohun Pal Chowdry* v. *Nobokrishto Poddar* (2) merely asserts the propositions laid down by the Contract Act.

Mr. *Agnew* in reply.

The following judgments were delivered:—

GARTH, C. J.—I think that, under the circumstances, the defendants were justified in refusing delivery of the goods. It has been contended, that as the goods were ascertained, and the time for their delivery and for payment of the price had been postponed, the property in them had passed to the plaintiff, (see s. 78 of the Contract Act); and that, consequently, the defendants' only remedy was to resell them after notice to the buyer under s. 107 of the same Act. Now, that section is headed "Re-sale," and it provides under what circumstances the vendor of ascertained goods has a right to resell them. But that is not the vendor's only remedy; and I can see no reason why s. 55, which provides for the rescission of contracts in certain events, should not apply to the present case.

We are bound, I think, to determine questions of this kind, so far as we can, by reference to the Contract Act, and not to English law; and ss. 51 to 58 appear to contain general provisions, which are applicable to all cases of reciprocal promises.

In this case, whether the property in the goods had passed or not, the parties had, undoubtedly, reciprocally promised,—the plaintiff to pay the price, and the defendants to deliver the goods, on a given day; and it is found by the Court below, that time was of the essence of the contract. In such a case s. 55

(1) I. L. R., 4 Calc., 252. (2) *Id.*, 801.

provides, that if the buyer is not ready and willing to pay the price at the time agreed upon, the seller has a right to rescind the contract, and to refuse to deliver the goods; and I consider that, upon the rescission, the property in the goods sold revested in the seller. It has been contended that the surplus money, paid to the defendants on the occasion of the delivery of the first twenty chests, was a part-payment of the price of the remaining thirty chests, which prevented the application of s. 55. But it has been found as a fact by the lower Court, that the delivery of the twenty chests was not "a delivery of part of the goods in progress of delivery of the whole." And whether this was so or not, I do not see why s. 55 should not apply; the plaintiff having the right, of course upon the rescission of the contract, to receive back the small balance due to him from the defendants. I think, therefore, that the judgment of the Court below should be confirmed, and that the plaintiff should pay the costs of this reference.

PONTIFEX, J.—I think that, under the circumstances stated, the defendants had a right to rescind and refuse delivery. The facts of further time having been given, and the plaintiff having agreed to pay godown rent for such further time, show, in my opinion, that time was of the essence of the amended contract, and bring the case within s. 55 of the Contract Act. But it is argued, that s. 55 applies only to contracts when the property in the goods sold does not pass to the buyer; that here the goods were ascertained, and by the proper construction of the contract the property in them passed to the plaintiff, and that s. 107 declares the remedy of the vendor under such circumstances.

No doubt, s. 107 declares one remedy, but it is only a partial remedy, for the purchaser might be insolvent and the market depressed, in which case it would be small satisfaction for the vendor to resell. Besides, s. 55 contains in itself words "or so much of it as has not been performed," which, in my opinion, show, that it was intended to apply to cases where the property in the goods passed by the contract, as much as to contracts where the property did not pass. And s. 39 contains similar words.

If there had been any machinery for the purpose in the Small

1880

BULDEO DOSS v. HOWE.

Cause Court procedure, the defendants ought to have paid the small balance in their hands into Court. As there was no such machinery, and as the sum is insignificant in amount, I think that it ought to be disregarded, though of course the defendants are liable to repay it to the plaintiff.

Attorney for the plaintiff: Mr. *Hart.*

Attorneys for the defendants: Messrs. *Sanderson & Co.*

INSOLVENCY JURISDICTION.

Before Mr. Justice Wilson.

1880
June 14.

IN THE MATTER OF THE PETITION OF D. COWIE AND ANOTHER.

Insolvent Act (11 *and* 12 *Vict., c.* 21), *s.* 51—*Breach of Trust—Mixing Trust-Funds with Money of Trustees—Commission on Trust-Moneys—Expectation of paying Debts—Deferring Personal Discharge.*

The words in s. 51 of the Insolvent Act relating to debts contracted—"without having any reasonable or probable expectation at the time when contracted of paying them"—are pointed, not at the case of a man who incurs a debt knowing that he cannot pay his debts generally, but at that of a man who incurs a debt knowing that he cannot repay that debt. The words in the same section—"if it shall appear that the insolvent's whole debts so greatly exceeded his means of providing for the payment thereof during the time when the same were in course of being contracted, reference being had to his actual and expected property as to show gross misconduct in contracting the same,"—apply not to this or that debt, or class of debts, but to all the debts, contracted for some years past. And under the circumstances of the case afford ground not for excepting any specified debt under s. 51, but for deferring the discharge under s. 47.

It is a grave breach of duty in trustees, or administrators taking out letters of administration, to estates in this country under powers-of-attorney from executors or next-of-kin abroad, to mix the incomes raised by them from trust-properties, or the funds of the estate, in one common fund with their own moneys, and such a course of dealing may expose the trustees or administrators to criminal as well as civil liabilities.

The insolvents carried on business as bankers and commission agents receiving the money of their constituents, on deposit, for investment or for remittance, charging a commission on each transaction, and allowing