The Coorla Spinning And Weaving Mills ... vs Vallabhdas Kallianji on 21 March, 1925

Equivalent citations: (1925)27BOMLR1168, 94IND. CAS.575, AIR 1925 BOMBAY 547

JUDGMENT

Marten, J.

1. This is a suit brought by the plaintiffs under a contract dated October 6, 1920, in respect of the sale to the defendants of 75 out of a total of 101 bales of bed-sheets, which were "bunto" goods, and were to be delivered between November 1920 and February 1921. The original plaintiffs, when the suit was filed on January 19, 1922, were the present second plaintiffs, Messrs. Keshavji Manekchand & Co, They are the sailing agents of the present first plaintiffs, the Coorla Spinning and Weaving Company, Limited, who were added as co-plaintiffs by my order of March 26, 1924.

2. It is common ground that on November 19, 1920, the defendants took delivery of six out of the 10] bales and paid for the same. The plaintiffs' case is that at the instance of one Mohanlal Anandji, who was a partner of the defendants or who was acting on their behalf, they gave time to the defendants as regards the balance of the goods, and agreed that the defendants should take delivery in one lot of all the remaining bales that were turned out to the end of February 1921. They accordingly gave a notice dated February 28, 1921, to the defendants that 75 bales were ready, and forwarded a delivery order. Subsequently they say they saw Mohanlal who promised to take delivery shortly. Next, on March 21, they wrote saying that twenty more bales became ready by March 16, and requiring delivery to be taken of 95 bales in all by March 31. No written reply was received to either of these letters. Then, on April 8, they sent a solicitors' letter to the defendants calling on the latter to pay for the 95 bales and to take them up without further delay, and stating that if they were not paid for within seven days, they would be sold on their account or proceedings would be taken. It is alleged by the defendants that this letter was not delivered till April 12.

3. On April 13, the defendants in their letter of that date for the first time repudiated their liability, and claimed that the bales were tendered after the due date. On April 28, the plaintiffs wrote stating in effect that the course they had taken as regards the 75 bales was by arrangement with Mohanlal. and that those bales must be taken delivery of, but that if so desired the question of the twenty bales could remain open. On May 25, the defendants replied that Mohanlal was not a member of their firm, but was only a broker in the transaction, and had no authority to act in the way suggested. Subsequently, on June 27, after further correspondence the goods were sold by public auction. Then, on November 10, 1921, this plaint was declared, but for some unexplained reason it was not admitted till January 19, 1922.

4. The defendants' case is that the contract was with the first plaintiffs, the Coorla Mills Company, and not with their agents, and that accordingly this suit is barred by limitation, as the Mills Company was not added as a co-plaintiff till after the expiration of three years from the date of the breach of contract in respect of which the suit is instituted. Secondly, the defendants say that Mohanlal was not a partner of theirs, nor was he authorised to grant any extension of time, and that accordingly they are not liable under the contract as the plaintiffs were not prepared to give delivery within the contract period.

5. As regards the formal issues raised in the case I may at once answer issues Nos. 1 and 6 as follows, viz. :-

> (Issue No. 1). The Coorla Mills Company Limited was added as a co-plaintiff in pursuance of the Court's order of March 26, 1024, after this issue was raised. (Issue No. 6). Yes. After inspection of the relevant book?, this was admitted by defendants' counsel on November 13, 1924.

6. As regards issue No. 6, I may state that Exh. E gives particulars of the bailing dates of the 75 bales. It will be seen that the first 59 bales were all manufactured by the end of January 1921, the next ton by February 22 and the last nine by the end of February 1921. The total is 78 and not 75 because the first three were part of the six bales delivered and paid for on November 19, 1920. The remaining three of these six bales were already manufactured at the date of the suit contract, and are not included in Exh. E, It will accordingly be seen that, so far as the plaintiffs are concerned, there was no reason why the bulk of the goods should not have been delivered long before the end of February, as under Clause 1 of the contract the defendants had to take delivery on the company giving intimation that the goods were ready, and under Clause 5 the company was exempted from delivering all the goods in certain events think, therefore, that part delivery was within the terms of the contract. This view is borne out by the part delivery actually effected on November 19 and has not been contested before me.

7. The plaintiffs say that the reason why the goods were not delivered when ready was because of Mohanlal's requests for time. This brings me to issues Nos. 3 and 4, and I have no hesitation in answering both of them in the affirmative. I entirely accept in this and other respects the evidence of Ratilal Keshavji Mehta, the salesman of plaintiffs No. 2. The opinion I formed of him was that he was a good and candid witness He explains that Mohanlal first negotiated a ready contract for 48 bales of similar goods dated September 28, 1920 (Exh. 1), and that though delivery was to be taken by the end of October, the defendants got into arrears and asked for time through Mohanlal. Time was granted at his request in respect of this ready contract, and eventually delivery was not completed till January 23, 1921, as will be seen from the statement Exh. B which sets out the various delivery dates. Consequently, says Ratilal, time was also requested in respect of the suit contract, and Mohanlal gave as one excuse that the defendants had not then re-sold the ready goods. This seems to me a natural story, and to be borne out by Exh. E. The defendants have not called Mohanlal, or made any attempt to find him, Their only witness is their partner Narsing Vallabhdas. He impressed me unfavourably, and where his evidence conflicts with that of the plaintiffs' witnesses, I think it should be rejected. In particular I think he gave false evidence when he stated

that the reason for defendants' delay in taking delivery under the ready contract (Exh. 1) was that the plaintiffs put them off' from time to time. I am satisfied that the plaintiffs never did anything of the sort, and that the real reason was due to Mohanlal's request for time. Another specific instance of false evidence is his statement in cross-examination near the end of the trial to the effect that he signed the suit contract at the plaintiffs' shop and that Devkaran, the plaintiffs' partner, then said that the plaintiffs would tell the defendants when the goods were ready. This was the first time that it was suggested that Narsing went to the plaintiffs' shop, or that Devkaran was present or took any active part in the matter. No such suggestion was made to any of the plaintiffs' witnesses: nor was it put forward in examination-in-chief, And when the witness was asked whether he ever told his solicitors or counsel about it, or whether he was inventing it in the witness box, he said ha did not remember. In my judgment it was an invention made under stress of cross-examination when he was being pressed to explain how according to his story he came to leave it to a mere broker to settle the details of a heavy contract for Rs. 60,000 or so.

8. Under all the circumstances I am also satisfied that after the first delivery of six bales it was agreed through Mohanlal that instead of taking delivery of the remaining bales as they became ready, the defendants should take delivery in one lot of all the remaining bales manufactured up to the end of February 1921. Accordingly in my judgment the terms of the suit contract were varied in this respect. It may, therefore, be that, strictly speaking, this was not a mere withholding of delivery at the request of the purchasers as in Ogle v. Earl Vane (1868) L. R. 3 Q. B. 272 and Hickman v. Haynes (1875) L. R. 10 C. P. 598, but amounted to the substitution of a new contract, which in England might have required to be in writing having regard to the Statute of Frauds. No point, however, was made as to this before me, and its materiality would mainly seem to arise in considering the question of Mohanlal's authority.

9. In the result as regards issue No. 7 I hold that the plaintiffs' letter and delivery order of February 28, 1921, were in time, although not received by the defendants till March 1, As the goods to be taken delivery of under the new arrangement were all those manufactured up to the end of February, it follows, in my opinion, that the plaintiffs would not be obliged to serve notice until February had expired, and the bales actually manufactured had thus been ascertained. My answer, therefore, to issue No. 7 will be : "The defendants were bound to take delivery of the 75 bales offered on March 1, 1921, on the true construction of the suit contract as subsequently varied by the arrangement with Mohanlal." On the facts therefore, as found by me, I need not consider what would have been the position if the suit contract had not been varied, But I incline to the view that in that event the notice actually given would have been too late, as the schedule to the contract stipulated for delivery "from November to February," and not for manufacture throughout those months Further under Clause 1, prior intimation had to be given to the defendants. Consequently to that extent the contract modified the terms of Section 93 of the Indian Contract Act.

10. I will next consider whether Mohanlal had the requisite authority from the defendants, and this brings me to issues Nos. 2 and 5. [His lordship examined the evidence. bearing on the point in detail, and expressed his conclusion thus:-]

19. After weighing then all the evidence, my conclusion is that Mohanlal's negotiations with the plaintiffs both before and after the ready contract and the suit contract were all effected with the knowledge and consent of the defendants, and that he was in these transactions their partner or at any rate a fully authorised agent and not a mere broker. I accordingly answer issue No 2 "Yes, or else wag a fully authorised agent of the defendants to act on their behalf in the manner alleged by the plaintiffs." And issue No. 5 " Yes."

20. Under the above circumstances I also hold that there was a breach of contract by the defendants, and that accordingly issue No. 8 must be answered " Yes." This is not a case like that of the Phoenix Mills Ltd. v. Madhavdas Rupchand (1916) 24 Bom. L. R. 142, where nothing at all was done by either party during the contract period. Nor is it like Toyo Menka Kaisha Ltd. v, Chabildas Nathuibhai (1921) 24 Bom. L R. 149, where the plaintiffs failed in their attempt to prove that the time for delivery had been extended by mutual consent.

21. I next come to issues Nos. 9, 10 and 11. The goods having been re-sold by auction, the suit is brought not for the price of the goods but (a) for the difference between the auction and contract prices under Clause 2 of the contract, or (b) alternatively for damages of the same amount or such other sum as the Court may deem fit to award. As regards (a) I am of opinion that the sale by auction whether under Clause 2 of the contract or Section 107 of the Indian Contract Act or otherwise must be within a reasonable time; that the sale on June 27, 1921, was unreasonably late; and that consequently the plaintiffs cannot rely on Clause 2 (see Harichand & Co. v. Gosho Kabushiki Kaisha Ltd. nor on Section 107 as justifying this particular sale. The provision in Clause 2 that "the company is at liberty to keep the said goods or re-sell them... on our account and at our risk " cannot, I think, be construed as a power to keep the goods as long as the company liked before it re-sold. I accordingly answer issue No. 10 " No."

22. As regards the alternative claim (b), I think issue No. 9 raises a question of difficulty as to the date of breach, viz., whether it should be taken to be within a few days of the service of the notice of February 28, 1921, say March 4, or else on or about March 31, when the notice of March 21 (Exh. 2) expired. This depends in the first place on whether I can accept Ratilal's evidence to the effect that after the notice of February 28, 1921, he saw Mohanlal several times, and that Mohanlal promised to take delivery shortly, [His lordship went into the evidence bearing on the question and concluded as follows :-]

26. In the result, I have arrived at the conclusion that Ratilal's evidence should be accepted in its entirety, and that having regard to Mohanlal's promises the plaintiffs shewed further forbearance and withheld delivery voluntarily at his request. But this further extension unlike the original extension to the end of February is not proved to have been to a definite agreed date. In this respect accordingly the case resembles Ogle v. Earl Vane (1868) L. R. 3 Q. B. 272 and Hichman v. Haynes (1875) L. R. 10 C. P. 598, 607 already cited. The English law on the point is thus stated in Mayne on Damages, 9th Edn., pp. 176-177 :-

> Where the time for performing; a contract of sale has been postponed, at the request either of vendor or purchaser, and the contract is ultimately broken, this has the

> effect of deferring the period at which the breach takes place, and therefore alters the date with reference to which the damages are to be calculated. The old contract continues, but the date of the broach is shifted. The damages for non-delivery or non-acceptance of the goods will be calculated at the market price of such goods on the last day to which the contract was extended if a date was fixed, or at the date when the plaintiff refused to grant further indulgence, or at a reasonable period after his last grant of an indulgence.

27. Under all the circumstances, then, I hold that the plaintiffs' notice of March 21 giving a final ten days' time was a reasonable notice to give. I accordingly fix the date of the expiration of that notice, viz., March 31, as the date of the defendants' breach of contract of Hickman v. Haynes and Plevins v. Downing (1875) L. R. 10 C. P. 598, 607. The plaintiffs' subsequent letter of April 8 would not, I think, extend the date of breach in the absence of proof of any subsequent negotiations after March 31, I accordingly answer issue No. 9 "March 31, 1921."

28. I next turn to issue No. 11 which raises the question of quantum of damages. If the property in the goods did not pass to the defendants, then putting aside Clause 2 of the contract, the measure of damages would normally be the difference between the contract rate and the market rate at the date of breach. (see Jamal v. Moolla Dawood Sons & Co. (1916) L. R. 43 I. A. 6, S. C. 18 Bom. L. R. 315). And damages on that basis could be awarded without an amendment of the plaint, even if the plaintiffs had only put forward the auction rate as the correct rate (see Narsinggirji Mafg. Co. v. Budansakeb In fact, however, in prayer (b) of the plaint the plaintiffs have claimed alternatively "such other sum" as the Court may deem fit to award as damages. In Jamal's case Lord Wrenbury, in delivering the judgment of the Board, says at p. 10:-

> The question therefore is the general question and may be stated thus : In a contract for sale of negotiable securities, is the measure of damages for reach the difference between the contract price and the market price at the date of the breach-with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the broach-or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that ho must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises. It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable stops to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it.

29. Then dealing with Sections 73 and 107 of the Indian Contract Act, his lordship states as follows at p. II:-

> The respondents further contend that Sections 73 and 107 of the Indian Contract Act, or one of them, are in their favour. As regards Section 107 their Lordships are unable to see that it has any application in the present case. It deals with cases in which a seller has a lion on goods or has stopped them in transits. The section follows upon sections dealing with those subject-matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares. As regards Section 73 it is but declaratory of the right to damages which has been discussed in the course of this judgment ... The teller's loss at the date of the breach was and remained the difference between contract price and market price at that date.

30. That case has been followed recently in Harichand & Co. v. Gosho Kabushiki Kaisha Ltd. where the Court of Appeal held that the vendors did not exercise their express power of re-sale within a reasonable time, and that consequently the correct measure of damages was the difference between the contract rate and market rate at date of breach and not the market rate at the expiration of a reasonable time in which the re-sale should have taken place. In that case delivery of fifty bales of yarn under a contract was to be given within sixty days of the arrival of a steamer, and in default there was an express power for the sellers "at any time to sell the goods by private sale or public auction." Twenty-five bales arrived in Bombay on December 24, 1920, and the remainder on January 21, 1921. The purchasers took delivery of two lots of four bales each on January 14 and March 13, 1921, respectively. They then objected that these bales bore the contract No. 10 instead of the original contract No 9/5, and so belonged to another contract with some different person. It was admitted that this number had nothing whatever to do with the quality of the goods. The seller's explanation was that it solely related to different numbering adopted by their Bombay branch as compared with their head office in Japan.

31. At the trial the main defence was this question of numbering. I decided this point against the purchasers. I next held that there Was a breach of contract by the purchasers in their letter of April 5, 1921, and that the express power of sale must be exercised within a reasonable time thereafter notwithstanding the use of the words "at any time." These particular findings were not challenged in appeal, and I may add that a somewhat similar question as to numbering has now been conclusively determined by the Privy Council in Ramjivan v. Bhikaji & Co. (1924) 28 Bom. L. R. 442, P. C. It was there held in effect that a first purchaser who is the owner of goods in the hands of a mill-owner can have any reference number he likes put on the bales provided it does not give any warranty or indication of the quality or description to his sub-purchaser or to others.

32. The next question in Harichand's case was whether the actual Bale on May 21 was within a reasonable time. At the trial this point was argued by counsel briefly without any reference to authorities, and depended on the view taken of the correspondence. Practically throughout April correspondence had passed between the respective solicitors in which the purchasers maintained their erroneous point about the numbering. On April 26, the sellers wrote demanding payment

within two days in default of which the goods would be sold. On May 2, the purchasers replied that they never had the idea of evading their liability, and that they would be quite prepared to take the goods provided they related to their contract, and they proposed that they would take the goods provided the sellers admitted they did not appertain to the purchasers' order and would make an allowance in the price on that account. Again, on May 6, the purchasers asked for the production of certain papers and correspondence and said that they had no desire to back out of the contract, and that if the proofs asked for were produced, they would pay for and take delivery of the goods without prejudice to their contention that they were not bound to take delivery as they did not relate to the contract. Subsequently, on May 17, the purchasers withdrew their offer, and the goods were re-sold on May 25.

33. The view I took of this correspondence was that having regard to the purchasers' letters of May 2 and 6, the sellers were not unreasonable in postponing the sale until the proposals made by those letters had been disposed of, But the view which prevailed in the Appeal Court (see p. 928) was that though in view of the unreasonable nature of the purchasers' objection to accept the goods, some time might properly be allowed for the vendors endeavouring to get the purchasers to reconsider their refusal, yet that the vendors should have taken steps for a resale after receipt of the purchasers' letter of April 21, and that the sale should have taken place at any rate by April 29, i. e., after the expiry of the two days mentioned in the notice of April 26, and that consequently the negotiations made by the purchasers on May 2 and subsequently should be disregarded as they did not materialise, but that otherwise some time should be allowed for the time taken up in advertising the sale, etc., e g., a week, such as ensued between the vendors' solicitors' letter of May 18 and the actual auction on May 25.

34. The case, therefore, in effect depended on the difference of two or three days between April 29 and May 2, and this difference resulted in the vendor being unable to justify his actual re-sale, and being consequently thrown back on his ordinary remedy. Damages were accordingly calculated according to the market rate at date of breach. At pp. 928-29 Mr. Justice Fawcett said:-

> The result, in my opinion, is that plaintiffs cannot recover the whole loss resulting from re-sale of May 26, and are thrown back on their remedy of damages on the ordinary basis of the difference between the contract rate and the market rate at the date of breach. This date may be taken to be the day following the defendants' actual refusal in their letter of April 5, i.e., April 6, 1921, ... It is true that in Prag Narain v. Mul Chand (1897) I. L. R. 19 All. 535, 541 the measure for damages allowed was the difference between the contract rate and the market rate at the expiration of a reasonable time in which the re-sale should have taken place. But I agree with the following criticism of this decision in Remfry'a Sale of Goods in British India (p. 406) :- ' But there seems to be no reason for a departure from the ordinary rule. The right given to the sailer includes the right to a reasonable time for effecting a resale, but if he does not exercise the power according to the terms of the section, there is no reason why he should obtain any benefit; under it, and the due date should be the day on which to ascertain the market value. The Privy Council decision in Jamal v. Moolla Dawood, Sons & Co. (1915) I. L. R. 43 Cal. 493, S. C. 18 Bom. L. R. 315, P. C. in effect

> says the same thing. In Angullia & Co. v. Saasoon & Co. (1912) I. L. R. 39 Cal. 568, 672 Harington J. took the same view, and this Court agreed with him in Narsinggirji Mafq. Go. v. Budansaheb . We, therefor allow this appeal and declare that the plaintiffs are entitled to recover damages from the defendants on the basis of the difference between the contract rate and the market rate of the goods on April 6, 1021.

35. So, too, at p. 933, Sir Lallubhai Shah said :-

> I do not read the judgment in that case [Jamal's case) as casting any doubt upon the proposition, which has been accepted in several cases to which I have referred, that a clause as to re sale gives a valid right to the sellers to claim the difference between the contract price and the price realised at the re-sale, provided that power has been exercised in accordance with the provisions of the clause. But whore that power has not been exercised within reasonable time, the only right of the sellers is to claim damages on the footing of the difference between the contract price and the market value of the goods on the date of the breach, without any reference to the price which might be realised by a re-sale at any time after the limit of reasonable time has been exceeded. My conclusion is that the defendants committed a breach of the contract on April 5 or 6, that a re-sale should have been effected soon after that-at the latest before the end of April-and that the subsequent negotiations and the subsequent resale cannot give the plaintiffs the right to claim damages according to the clause as to re-sale.

36. In both the above cases, however, the property in the goods did not pass to the purchaser. Does it make any difference then in the present case supposing the property did pass? This point was not referred to in the final arguments, which were all based on the assumption that if the auction sale was bad, the measure of damages would be the difference between the contract rate and the market rate at the date of breach, That assumption appears to me to be correct. On my above findings the plaintiffs cannot rely on Section 107 of the Indian Contract Act as the re-sale was unreasonably late, Consequently, as in Jamal's case (1915) L. R. 43 I. A. 6, 11, S. C. 18 Bom. L. R. 315, Section 107 does not apply, and we are left with Section 73. Accordingly the plaintiffs may sue for damages under Section 73, and prior to the re-sale they would also have had the alternative remedy of suing for the price, although the latter remedy is not mentioned in the Indian Contract Act (see P. R. & Co. v. Bhagwandas (1909) I. L. R. 34 Bom. 192, S. C. 11 Bom. L. R. 335 and Finlay Muir &, Go. v. Radhakissen Gopikissen (1909) I. L. R. 36 Cal. 736. The same result would, I think, follow under English law, as the defendants had not actually received the goods. Thus, in Mayne on Damages, 9th Edn., at p. 168, I find it stated as follows :-

> If the purchaser refuses to accept the goods, and the property has passed to him, the vendor may at his option consider the contract of Bale as still unbroken, and recover their entire price in an action for goods bargained and sold, even though they have not been delivered. He may, on the other hand, after the time for acceptance has expired, or any other essential condition has been broken, sue for breach of the

> contract, even after he has re-sold the goods. In the latter case, the measure of damages is the difference between the contract price and the market price at the time when the contract ought to have been completed, for the seller may take his goods into the market and obtain the current price for them.

37. Accordingly in the view I take, the measure of damages would be the same in the present case whether the property did or did not pass. But if it is necessary to decide the point, I hold that the property did pass to the defendants. I think it clear that by their letter and delivery order of February 28, 1921, the plaintiffs appropriated these 75 bales to the contract (see Pignataro v. Gilroy [1919] 1 K. B. 459). I am further of opinion that this appropriation was assented to by the defendants within the meaning of Section 83 of the Indian Contract Act, having regard to my above findings that Mohanlal asked for and was given time after the receipt of the plaintiffs' letter and delivery order.

38. I should perhaps add that it was never contended before me that the effect of Clause 2 of the suit contract was that the only remedies open to the vendors were either to keep the goods or to re-sell, and that having elected to re-sell and the re-sale being invalid the vendors could not rely on their alternative remedy. Nor was it contended that if the vendors elected to keep the goods, they were not entitled to damages in addition. In my opinion Clause 2 does not have any such effect, and I only mention the points to shew they have not been over-looked. The contract may be badly drafted, but I do not think that its language forces me to attribute to the parties such an improbable Intention as the above.

39. As regards the actual market rates, I have already held in answer to issue No. 9 that the date of breach is March 31, 1921. being the date on which the plaintiffs' notice of March 21 expired. To save costs, the parties have very sensibly agreed that whereas the contract rate was at Re 1-10-6 per lb., the market rates on February 28 and March 1 were Re 1-8-0, on March 9, Re. 1-6-6, on March 31, Re. 1-6-0 and on April]3, Re. 1-6-3, and that the average rate obtained at the auction sale on June 21 was Re. 1-6-0, Also that the market rate on any date between March 1 and 9 should be taken to be Re. 1-7-3.

40. But it will be noticed from the passage which I have quoted from Harichand'a case that the market was there taken as at April 6 being the date following the purchasers' actual refusal in their letter of April 5. Possibly it was assumed that this letter was not received till the 6th, though this does not appear from the Appeal Paper Book. But I find on looking at the subsequent unreported proceedings that the date finally adopted by the Appeal Court was April 7 and not April 6, as April 6 was a close holiday.

41. Further, in Halsbury, Vol. X, p. 332, note (g), I find it stated :-

> The ditterence is more properly that between the contract price and the market price on the day after the breach, for the defendant has the whole of the day fixed for delivery on which be deliver.

Shaw v. Holland (1846) 15 M. & W. 136 is cited in support of this proposition, but in my opinion it does not bear it out. On the contrary as I read the decision the damages were based on the market rate of the last day of a seven days' notice given by a vendor to a purchaser to take delivery. The head-note ends :-

In an action for the non-delivery of shares on a given day, pursuant to contract, the proper measure of damages is the difference between the contract price and the market) price on the day when the contract was broken.

In that case, on March 3, 1845, the plaintiffs gave a notice which ended (p. 142):

If those scrips are not delivered to me on or before the 10th instant, I shall buy them in against you, and debit you with the difference.

Then at p. 146 Baron Parke said :-

The question therefore is, when it (the contract) was broken. Now the plaintiff, by his letter of March 3, gave the defendant until March 10 to deliver the shares; and he is not, therefore, entitled to calculate the damages with reference to any amount the shares might have sold for subsequently to the 10th.

Accordingly the damages awarded in the lower Court were reduced on that basis.

42. In Narsinggirji Mafg. Co. v. Budansaheb , delivery had to be taken by December 31, 1919. In remanding the suit for a re-trial, the Appeal Court framed the following issue: " (2) If the broach of contract was by the defendant and not by the plaintiff, what was the market price of the goods on December 31, 1919?" And Sir Norman Macleod added (p. 527);-

The Court below has found that the contract time was not extended. If the defendant committed the breach, the plaintiff will be entitled to the difference between the contract rate and the market rate as found.

Presumably December 31, 1919, and also January 1, 1920. were close holidays, but in such a case the Court has to arrive at the rate as best it can by considering the rates available for the days nearest to the date of actual breach.

43. In the present case I appreciate that as on my findings the property passed, and the defendants had the whole of March 31 in which to pay, the plaintiffs could not have safely gone into the market and re sold these bales on March 31. Hut as 1 read the authorities already cited, the principle on which the date of the breach in taken is because it is the loss to the plaintiff' on that particular date which has to be ascertained. As Lord Wrenbury emphasises in Jamal's case (p. 11): " The sellers' loss at the date of breach was and remained the difference between the contract price and the market price at that date." That being so, it is really misleading to consider how soon in fact the vendors could reasonably have re-sold after the date of breach. The materiality of that would only arise if the

vendors were validly exercising their powers of resale under Clause 2 of the suit contract, or Section 10V of the Indian Contract Act. In that event a week might well be spent if the sale was to be by auction and advertisements etc. issued (of. Narsinggirji Mafg, Co. v. Budansaheb).

44. But on my findings the vendors did not validly exercise these special powers, and consequently they can now only rely on their ordinary remedy. And one can well see that if some date after the date of breach was adopted, this might lead to disputes and difficulties as to what subsequent date should be adopted in any particular case, and that in a fluctuating market the difference of even a day might lead to serious differences in money. And as regards the mitigation of damages.

Under Section 73, that again is at the date of breach. It is not suggested here that at that date there was anything special which the vendors should have done, but did not do, apart from the exercise of their power of sale which stands on a different footing.

45. Following then what I understand to be the principle laid down in Jamal's case and in Narsinggirji Mafg. Co, v. Budansaheb, I hold that I ought to take the rate of the date of breach, viz., March 31, as the determining rate This rate, as I have already said, is Re. 1-6-0 per lb. I accordingly answer issue No. 11 "Yes, The damages should be calculated on the difference between the contract rate of Re. 1-10-6 and the market rate on March 31, 1921, of Re, 1-6-0 with reference to the 75 bales in suit " The aggregate sum representing this difference must be worked out as proper particulars were not given either in the plaint or at the trial, and the sum actually claimed includes interest.

46. As regards issue No. 12, a question arises about interest. The plaint claims interest prior to the suit, but this cannot, I think, be allowed. As the sum awarded by me represents damages at date of breach, I do not think that Clause 3 of the contract extends to interest on such damages- But interest from date of the suit stands on a different footing. In the subsequent unreported proceedings in Harichand's case, interest on damages was awarded by the Appeal Court under Section 34 of the Civil Procedure Code, from the date of the suit, and Mr. Justice Fawcett stated that in his opinion it was desirable that where a party improperly delayed the ascertainment of damages for three or four years, he should be penalised in this way, and that the main objection advanced by the defendants to take delivery had no substance in it.

47. In the present case the second plaintiffs declared their plaint on November 10, 1921, and filed it on January 19, 1922. So there was no unreasonable delay. Substantially they have been awarded the principal sum they claimed. They themselves paid it to the Mill Company in June and July 1921. They have now been out of their money for over three years. and in my opinion the defendants' main objection as to Mohanlal's want of authority is a dishonest defence. Under all the circumstances I think it fair and so hold that under Section 34 of the Civil Procedure Code the damages awarded should carry interest at six per cent, from January 19, 1922, when the plaint was filed down to the date of judgment,

48. In the last issue (viz., No 13) the defendants rely on limitation. This issue was not raised until the second hearing when the Mill Company had been added as a co-plaintiff, and an amended written statement pleading limitation had been put in. It depends primarily on what was the date of breach

and that is why I have set out at length my reasons for adopting March 81, for the difference in money values is comparatively small. The material dates are as follows, I have already found that the date of breach was March 31, 1921. My order directing the Mill Company to be added as a co-plaintiff was made on March 26, 1924, The amendments to the plaint actually adding them as parties were made on March 28, and the amended plaint was formally re-declared by Ratilal on March 31,1924. Under these circumstances I hold that the joinder of the Mill Company as plaintiffs was within time, viz., three years of the date of breach, and that accordingly issue No. 13 should be answered " "No."

49. Apart, then, from any question of costs, it is unnecessary for me to decide the points of law which would arise if the date of breach was found to be earlier, say March 4, 1921. But in deference to the able and interesting arguments of counsel, and as in general it is desirable for a trial Judge to give his decision on all important disputed points, I will now consider this issue on the assumption that (contrary to the view which I hold) the Mill Company was not added as a co-plaintiff until more than three years had expired from the date of breach. In the first place I reject the plaintiffs' contention that the suit contract was with the selling agents alone. It may be taken in the plaintiffs' favour-and I so hold-that the contract Exh. A alone should be looked at, and that the other document Exh, A 1 which is not signed by anybody and has no rubber stamp endorsement by the agents is not a duplicate, but is only a copy of part of the original contract.

50. Now Exh. A is a printed form in a contract book which is supplied by the Mill company to the selling agents. In the printed body of the form no other company but the Mill Company is referred to Clauses 3 and 5 expressly refer to the company's "Mill," and it is not suggested that the agents have any mill. I think, therefore, that in Clauses 1, 2, 3, 5 and 6 of Exh. A the reference to "the company" are clearly to the Mill Company, and that having regard to the nature of those Clauses, it cannot be successfully contended that the Mill Company was merely a third party. For instance, under Clause 2 it was "the company" who on the purchasers' default had the power either to keep or to re-sell the goods and to recover damages on a re-sale. Under Clause 5 the company had a conditional power to cancel the contract, in which case the purchaser was not to get any compensation from the company.

51. Plaintiffs' counsel laid stress on the rubber stamp endorsement bearing the agents' name; and also on the printed statement in the contract that the defendants "have this day agreed to purchase from the Coorla Spinning and Weaving Company Ltd.'s shop (Dookan) for selling cloth situate in the new cloth market the below mentioned goods..." This is an ambiguous and stupid form, and I hope that at any rate one result of this case will be to ensure that the plaintiffs adopt another form in the future. Strictly speaking you can buy "at" a shop, or "from the proprietors of a shop," but not "from a shop." The distinction in between the place and the persons; but sometimes the word 'shop' is used as including or referring to the goods in a shop. The difficulty here is that although the goods manufactured by the Mill Company are sold at this shop, the proprietors of the shop are the selling agents, and not the Mill Company Possibly in some bygone days the Mill Company kept their own shop, and this form was in use then and has not since been altered, but this is mere guess work for there is no evidence of it. And if the contract is intended to be with the persons who keep the shop where the Mill Company's goods are sold, then this is inconsistent with the body of the contract which refers to the Mill Company alone, unless one treats such persons as contracting agents for the

Mill Company.

52. In this respect the rubber endorsement is helpful and shews that the contract was at any rate effected by the aid of the selling agents, just as an application for shares in a company by a member of the public might bear a banker's or broker's stamp. But although it contains the words "& Co.", I do not think this involves a reference to the selling agents in the body of the contract where the words "the company" are used. The agents were not a company in the ordinary sense of the word, and would not, I think, be referred to as such. Ratilal tells us that the reason for the rubber endorsement was to shew that the purchasers were to credit the selling agents and not the Mill Company on delivery of the goods, and that they might know that the contract was with the selling agents, All people in the market knew that they were the selling agents of the Coorla Mills, but some outside merchants might not know this. And though the defendants have not put their books in evidence to shew whom they gave credit to for the ready bales and the six delivered bales, it seems clear that they transacted all business with the selling agents throughout, and not with the Mill Company. But this observation and also Ratilal's statement may perhaps be open to the objection that it is parol evidence as to the intention of the parties under a written contract (see Bowstead on Agency, 6th Edn., Article 11,9, p 405) and I think it safer therefore to disregard it.

53. On the whole I think the true view is and I so hold that the contract was with the Mill Company acting by their selling agents. In much the same way a club often executes its contracts by a named agent, e. g., its secretary. And in effect the view adopted by both parties in the initial correspondence is not very different. In their letter of April 8, 1921, the vendors' solicitors write: " on behalf of our clients Messrs. Keshavji Manekchand & Co. selling agents of the Coorla Mills." In the reply of April 13 the defendants' solicitor writes: "By the contract referred to...your clients agreed to deliver to ours..." I further hold that under all the circumstances the rubber endorsement had the effect of a signature on the contract by the selling agents as such and acting on behalf of the Mill Company. In this respect it will be borne in mind that but for this rubber endorsement there was no signature by or on behalf of the vendors either in Exh. A or Exh. A 1.

54. Counsel were unable to assist me with any authorities in arriving at this conclusion, but the contract is I hope sui generis, and accordingly one could not expect to find a case in point.. The converse case of the personal liability of an agent in various instances has recently been the subject of much litigation in the English Courts, culminating in the decision of the House of Lords in Universal Steam Navigation Go. v. James McKelvie & Co. [1923] A.C. 492 but the facts are too different from the present case to afford much assistance.

55. Turning again to the suit contract, this signature by the selling agents would not, I think, necessarily allow the selling agents to sue on the contract without joining the Mill Company, having regard to the terms of the body of the contract. That being so, I see no reason to alter the opinion which I formed on March 26, 1924, that it was desirable that the Mill Company should be added as a co-plaintiff. I thought the case was one where their "presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit," within the meaning of the second branch of Order I, Rule 10 (2). I lay stress on this word 'may.' It should be contrasted with the first branch of the section, viz., "any person who

ought to have been joined." The effect of the decided cases on this sub-section appears to be that the first branch refers to necessary parties and the second to proper parties.

56. It was next argued on behalf of the, defendants that the suit was defective and must have been dismissed unless and until the Mill Company was added. In other words, that the Mill company were necessary and not merely proper parties. The plaintiffs, on the other hand, contended that the selling agents had here a beneficial interest in the completion of the contract, and could accordingly sue in respect of it. This rule extends in England to auctioneers and factors, and is thus expressed in Bowstead on Agency, 7th Edn,, p. 431:-

> An agent may sue in his own name on contracts made by him on behalf of his principal in the following case, namely,..(ft) where, as in the case of factors and auctioneers, he has a special property in, or lien upon, the subject-matter of the contract, or has a beneficial interest in the completion thereof.
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> Williams v. Millington (1788) I H. BI. 81, Robinson v. Rutter (1855) 4 El. & B1. 951 and Consolidated Co. v. Curtix & Son [1892] 1 Q. B. 495 may be referred to in this connection.
>
> Similarly in India Sir Arnold White in Subrahmania Pattar v. Narayanan Nayar (1900] I. L. R. 24 Mad. 130 says as follows (p. 135) :-
>
> He (Willes J.) says the proper person to bring the action is the person whose right has been violated. Though there are certain exceptions to the general vale, for instance, in the case of agents, auctioneers or factors, these exceptions are in truth more apparent than real, etc. The real proposition of law, which these and other cases establish, is that, where an agent outers into a contract as such, if he has interest in the contract, he may sue in his own name. Unless the contract for the breach of which the action is brought is one made by the agent he has no cause of action because there is no privity between himself and the defendant.
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> 58. It may be that in that particular case this was obiter because it was held on the facts that there way no privity between the plaintiff and defendant (see p. 136), and that accordingly the plaintiff's failed on that ground alone. But the comment on the case in Pollock and Mulla, 4th Ed,, p. 742, 5th Edn., p. 722, is :-
>
> This is not a real exception to the rule laid down at the beginning of the section, the agent being in such case virtually a principal to the extent of his interest in the contract.
>
> The section in question is Section 230 of the Indian Contract Act which runs:-
>
> In the absence of any contract to that; effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor i3 he personally bound

by them.

Then follow certain specific exceptions which do not apply here.

59. As regards the question of fact whether the selling agents had here a beneficial interest in the completion of the contract, I find that point in favour of the plaintiffs, The details of the agency terms are not perhaps as full as they might be, partly because Mr. Bhagvati very prudently did not cross-examine to bring them out. I think, however, it is sufficiently proved that the terms of business were that the agents were remunerated by commission, but that they took delivery from the Mill Company and were debited by the Mill Company with the price of the goods, and that they in their turn delivered the goods to the purchaser and were paid by the purchaser. As the delivery and payment of the six bales were admitted, the details were not gone into, but in the concluding stages of the trial counsel for the defendants admitted that the delivery order for the six bales was in the same form as that sent on February 28, 1921 (Exh. C 1), which was signed by the selling agents and addressed to their own godown-keeper. 1 further find that normally the delivery by the Mill Company to the agents would be at or about the same time as the latter were to deliver the goods to the purchaser. But if the purchaser failed to complete, then I think the loss, if any, would fall on the selling agents in cases where they had once accepted or taken delivery from the Mill Company. For instance, in the present case the Mill Company eventually delivered the bales to the selling agents at the time when the auction sale took place. On the other hand the selling agents were debited with the suit contract price of the goods and not with the price realised at the auction. Consequently they stood to lose by the amount of the difference between the contract price and the auction price.

60. It was at one time contended that the agents never in fact paid the company the contract price. But it became clear from the accounts produced that at the date of the auction the selling agents were largely in credit with the Mill Company, and that in fact their account still remained in credit after the contract goods had been debited to them. Accordingly in the concluding stages of the trial it was admitted by the defendants' counsel that this amounted to payment by the selling agents to the Mill Company. Shortly stated, therefore, I hold that the selling agents were in the position of delcredere or guaranteeing agents, and that on the defendants' default they paid their principals, the Mill Company, the amount due by the defendants.

61. I quite appreciate that there is no express assignment here of the Mill Company's right to damages for breach of contract. Even if there had been, the question would still remain whether it would not be wise to add the assignor as a party. I do not wish to go into English practice for there is a difference there between what is made assignable by the Judicature Act and what is assignable in equity. But I may refer to the judgment of Lord Macnaghten in Tolhurst v Associated Portland Cement Manufacturers (1900) [1903] A. C. 414 where at p. 420 he said as follows :-

It is well settled that as a general rule the benefit of a contract is assignable in, equity and may be enforced by the assignee. The assignor ought in ordinary circumstances to be made a party. But I cannot think that this is necessary when the assignor is a mere name, as the Imperial Company is in the present case, without any moans and without any executive or board of directors, if indeed it has now any corporate existence at, all. I am not aware of any authority for this proposition, but it seems to no to be in accordance with the practice in equity, and it is supported by what was said by James V. C. in Castellan v. Hobson (1870) L. R. 10 Eq. 47.

In the above case the Imperial Company had sold its undertaking to an amalgamated company, and then gone into voluntary liquidation, its affairs being wound up and its assets distributed.

62. In the present case the Mill Company is still a going concern, but at the date when the suit was filed, the selling agents had long since paid the Mill Company for the contract price of the goods, and so prima facie they would be entitled in equity to an assignment of the Mill Company's rights under the suit contract. And I think they can put their case higher than this They were in the position of sureties who had paid all they were liable for. Consequently, upon such payment the selling agents " were invested with all the rights which the creditor had against the principal debtor " and became entitled to the benefit of every security held by the creditor (see Sections 140 and 141 of the Indian Contract Act), I have not been referred to any authority on Section 140, but the word "invested " seems to me a strong one, and coming as it does in a statute, I do not see why in a case like the present it should not operate as a transfer to the surety of the creditors' rights without the necessity of any written assignment. If so, then one of those rights would be to damages for breach of contract. In that event, there is some authority for holding that even in England if there has been an assignment the surety could sue in his own name (see Halsbury, Vol. XV, p. 506 Article 956), although in general a del credere agent may not be able to do so (see Bowstead on Agency, 6th Edn., p. 432),

63. But however that may be, it is, I think, clear that at the date of the suit the sole beneficial interest was in the selling agents, and that the Mill Company were only nominal parties, and were in a position resembling that of a bare trustee. On the other hand, it was desirable for the protection of the defendants that the Mill Company should be added so that the defendants should not be exposed to any separate claim by the Mill Company, and that the matter should be adjudicated upon once and for all,

64. Under those circumstances if it had been necessary for me to decide the point, 1 should have been disposed to hold that the Mill Company were proper rather than necessary parties, and that, following the principle of the decisions of this Court in Ravji v. Mahadev (1897) I. L. R. 22 Bom. 672 and Guruvayya, v. Dattatraya (1903) I. L. R. 21 Bom. 11, S. C. 5 Bom. L. R. 618, the suit was not barred merely because the

Mill Company was not added until after the period of limitation had expired. In the former case it was held that a suit brought originally by a benamidar was not barred on the ground that the person for whom he was a benamidar was not added until after the period of limitation. In the latter case an ejectment suit brought by the manager and one other member of the joint family was held not to be barred merely because other members of the family were added after the period of limitation. Those cases are no doubt distinguishable from the present one, but they shew what view our Courts have taken of Section 22 of the Indian Limitation Act, and Section 32 of the Civil procedure Code, and no case exactly in point has been cited to me,

65. In the view, therefore, which 1 take, the defendants fail in any event in their defence of limitation. But I may add as a word of warning that Bombay Mill companies and their selling agents would be well advised to see that their selling contracts are free from ambiguity as to who the real vendors are, and that in many cases, to avoid legal difficulties, it may be advisable For both parties to sue as co-plaintiffs, as indeed was the case with the suit brought by the Mathuradas Mills. Exh. K 1. In the other case, Exh. No. 6, the position was clear and the suit was brought by the Sassoon Mills alone

66. There will accordingly be a decree for the plaintiffs for an amount and interest thereon to be ascertained in accordance with ray answers to issues Nos. 11 and 12, As regards costs, the defendants will pay the plaintiffs' costs of the suit throughout except that the plaintiffs are to pay the costs of adding the Mill Company and the defendants' costs of the hearing on March 26, 1924, and of and occasioned by the adjournment ordered on that day, including their amended written statement, and there will be the usual set-off of costs. There will be interest on judgment at six per cent.