

1937

*Present: Hearne J. and Fernando A.J.*DADA *v.* THE BRITISH CORPORATION, LTD.270—*D. C. Colombo, 4,772.*

*Contract—Sale of goods—C.I.F contract—Failure to tender bill of lading—Acceptance of delivery order by buyer—Waiver of obligatory documents.*

Where on c.i.f contract for the sale of goods the seller sent a delivery order instead of a bill of lading and the buyer accepted the order,—

*Held*, that the buyer must be deemed to have waived his right to receive the bill of lading under the contract.

**B**Y a contract entered into on November 1, 1935, the plaintiff sold to the defendant company 1,000 cwt. sun dried F. M. S. copra packed in bags at Rs. 8.25 per cwt. nett c.i.f. Colombo; payment was to be made "against delivery". The correspondence produced in the case showed that the copra arrived on or about November 10, 1935. The plaintiff wrote to the defendant company on November 12, enclosing a "Provisional Bill" on payment of which plaintiff offered to hand defendant "the documents". Defendant company paid Rs. 7,425 being 90 per cent. of the value of goods and requested plaintiff to send defendant the document, promising to pay the balance "after delivery". They also requested plaintiff to be present at the weighing at the defendant's mills when taking delivery. Plaintiff sent the defendant on November 13 a delivery order and the insurance policy and stated that his responsibility ended with the delivery of the documents as the contract was on c.i.f. terms. The delivery order was a letter written by the local agents to the Principal Collector of Customs on November 12 requesting the latter to "hold at the disposal of" the plaintiff 541 bags of copra weighing nett 1,000 cwt.; this letter bore an endorsement in the terms "please deliver to Messrs. British Ceylon Corporation, Ltd." and was signed by the plaintiff; underneath that "endorsement" was the signature of the defendant company's manager upon which signature the Customs released the copra to the defendant. After taking delivery the defendant company paid only Rs. 476.28 instead of the full balance sum of Rs. 825. The plaintiff wrote and insisted upon payment of Rs. 348.72 being the difference required to make up the Rs. 825 on the ground that as the copra was sold on c.i.f. terms he was not responsible for any shortage. The defendant refused to do so as the copra was 42 cwt. 30 lb. less than 1,000 cwt.

At the trial the defendant company's position was that the contract was not a c.i.f. contract but was a contract by which the plaintiff had to deliver the full quantity of 1,000 cwt, nett and that payment was to be made against delivery of that quantity and not against delivery of the documents and that the letters c.i.f. in the contract merely meant that the plaintiff was to pay cost, the insurance, and the freight. The defendant also took up the position that if the contract was a c.i.f. contract in the fullest sense, the plaintiff had failed to fulfil the terms

of such a contract in that he had failed to tender a bill of lading and had tendered only the delivery order above referred to. Plaintiff accordingly raised a further issue as to whether the defendant company was precluded from relying on the failure to tender a bill of lading by reason of its having accepted such documents as were tendered by plaintiff or by waiving the tender of any other documents.

The learned District Judge held that the contract was a c.i.f. contract, and that the plaintiff had failed to fulfil his obligation by the omission to tender a bill of lading. If it was not a c.i.f. contract, but an "arrival contract" the plaintiff's action would equally fail as he had failed to deliver a 1,000 cwt. of copra. He accordingly dismissed the plaintiffs' action. The plaintiff appealed against this judgment.

*N. K. Choksy* (with him *Stanley de Zoysa*), for the plaintiff, appellant.—The contract is unquestionably a c.i.f. contract and the Judge has so found. Defendant did not accept that position and put plaintiff to the proof that he had fulfilled the contract by shipping at Singapore exactly 1,000 cwt. of copra, but relied firstly upon the position that it was "an arrival contract" and alternatively that if it was a c.i.f. contract plaintiff had not fulfilled it by tendering a bill of lading. But plaintiff made it clear in his letters that it was a c.i.f. contract under which his only obligation was to tender documents and he accordingly tendered an insurance Policy and a delivery order (having previously signed a "Provisional Bill" which was equivalent to an invoice as it gave the particulars of the goods and the amount due at the contract rate). Defendant accepted these documents without protest and was able to obtain delivery as fully and effectually as if plaintiff had signed a bill of lading. Had defendant refused to accept the delivery order the plaintiff had the right in law to make a fresh tender of the correct documents within the contract time (*Borrowman v. Free*<sup>1</sup>).

Defendant must be deemed to have waived his right to insist upon the delivery of a bill of lading; such a waiver is possible—see *Orient Company, Ltd. v. Brekke and Howlid*<sup>2</sup>. In these circumstances judgment must be entered for plaintiff.

*F. C. W. van Geyzel*, for defendant, respondent.—A contract for the sale of goods c.i.f. is not performed by the delivery of goods but by the tender of the necessary documents, viz., invoice, insurance policy and bill of lading. (*Biddell Bros. v. Clemens Horst*<sup>3</sup>; *Karberg & Co. v. Blythe*<sup>4</sup>.) No bill of lading was tendered to the defendant company and it is clear from the evidence that the plaintiff could not even at the trial produce it. His claim on a c.i.f. contract must, therefore, fail.

The defendant company cannot be said to have waived the right to insist on the customary documents, because the company's view had always been that the contract was an "arrival" contract and not c.i.f.; in these circumstances there could be no appreciation of the relevancy of the documents and, therefore, no waiver.

*Cur. adv. vult.*

<sup>1</sup> *Q. B. D. 500.*

<sup>2</sup> (1913) 1 *K. B. 536.*

<sup>3</sup> (1912) *A. C. 18.*

<sup>4</sup> (1916) 1 *K. B. 495.*

September 14, 1937. HEARNE J.—

The plaintiff sued the defendant company for Rs. 348.72 being the value of the difference between 1,000 cwt. and 957 cwt. 82 lb. of copra. The copra was coming from overseas. It is unnecessary to deal with all the facts of the case. The determination of the suit depended upon three considerations. If the contract was an arrival contract the defendant company was not liable. If it was a c.i.f. contract the question was whether the plaintiff had delivered what are known as the "obligatory documents" under a c.i.f. contract. Finally if he had not delivered the obligatory documents, did the defendant company by express agreement waive any of the obligatory documents and in lieu thereof accept another document.

The learned trial Judge found, and his finding is unexceptionable, that the contract was a c.i.f. contract. He then considered the contention of the defendant company that "the plaintiff had not fulfilled his obligations under such a contract to tender a bill of lading". This issue (it is issue 2) he decided against the plaintiff when he held that "there was no constructive delivery by tender of a bill of lading". Having so found he dismissed the plaintiff's suit. But he failed to consider the further issue of whether the defendant company having accepted a delivery order in lieu of a bill of lading was not liable on the contract as a c.i.f. contract.

The law on the subject is settled. If a seller tenders in place of one of the obligatory documents—for instance, a warehouse order or a ship's release in place of a bill of lading—the buyer need not accept it and the seller may subsequently retender proper and valid documents provided the time for tendering has not gone by. But a buyer may by express agreement accept another document, for instance a warehouse order, in place of a bill of lading.

The facts of this case indicate either that the defendant company did not appreciate the significance of a c.i.f. contract, or if they did that they sought to convert what the Judge found to have been a c.i.f. contract into an arrival contract. In their letter of November 12, 1935 (D3) they ask the plaintiff to forward the necessary documents and to arrange for a representative of his to be present at the weighing of the copra. In his letter (P3) dated the following day (November 13) the plaintiff pointed out that his terms being c.i.f. terms his responsibility ended with the delivery of the documents. There was a clear indication to the defendant company that such documents as the plaintiff was tendering were being tendered "on c.i.f. terms". The plaintiff enclosed a delivery order in place of a bill of lading and thereafter the defendant company took delivery. In view of the clearest intimation to the defendant company that the documents were tendered under a c.i.f. contract it must be held that they had expressly agreed to accept the delivery order in place of the bill of lading. Any misconception on the part of the defendant company as to the nature of the contract cannot affect its character or the legal implications of their conduct.

I would allow the appeal and enter judgment as prayed for by the plaintiff with costs in this Court and the Court below.

FERNANDO A.J.—I agree.

*Appeal allowed.*