Present: Bertram C.J. and Schneider J.

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ADAMJEE LUKMANJEE *v.* FRADD & CO.

62—D. C. Colombo, 488.

Contract—Agreement to deliver oil f.o.b. at a fixed price—Payment against mate's receipts—In the event of shipment being hindered by the buyer, payment to be not later than three days after notice that oil was ready for shipment—Duty of buyer to nominate steamer within reasonable time.

The defendant agreed to deliver in December, 1920, 100 tons of oil in pipes in good merchantable condition. The price was fixed f.o.b. Payment was to be against mate's receipts, but in the event of shipment being in any way hindered by the buyer, payment was to be not later than three days after notice was given to the buyer that oil was ready for shipment.

Held, that as the contract was that delivery shall be made within a certain time f.o.b., it was implied that the buyer will nominate a steamer on board which the delivery was to be made, and that the nomination shall be given within a reasonable time so as to allow of the goods being put into a deliverable state.

Held, further, that the clause as to payment did not render it necessary for the defendants to put the oil into a deliverable state before the expiration of December 31, and to put it at defendants disposal before that time, if the buyer had failed to give reasonable notice of the steamer for shipment.

THE facts appear from the judgment.

Drieberg, K.C. (with him *F. H. B. Koch*, *M. W. H. de Silva*, and *Garvin*), for appellants.

Hayley (with him *Loos*), for respondent.

September 20, 1922. BERTRAM C.J.—

This is an action for the recovery of Rs. 6,500 as damages alleged to have been sustained by reason of the wrongful failure of the defendants to provide freight, or to give due notice for the delivery, or to take delivery of 100 tons of coconut oil ordered by the defendants from the plaintiff.

I am unable to see that the appellants have made out any case. Defendants ordered from plaintiff 100 tons of oil for delivery in the course of the month of December. The contract provided that the oil should be in pipes with small packages as customary to suit stowage; delivery was to be made in December, 1920, in good merchantable condition, and the price was fixed f.o.b. The plaintiff,

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therefore, was under an obligation to deliver the oil, packed in the manner described, on board the steamer. Defendants were given to understand that the oil would be ready towards the end of the month. Acting on this understanding, they made provisional arrangements for freight, and the steamer, by which they expected to ship the oil, was due on the 31st. On the 31st or the 1st the defendants received an invoice indicating that the goods were at their disposal. No nomination of any steamer was, in fact, given by the defendants to the plaintiff until January 1st, and it is obvious, to say the least, that it would be extremely difficult for the oil to be put in a state to enable it to be delivered on a steamer at such short notice as these facts would imply. Every effort was made by the defendants to get the oil shipped by the steamer. Their original arrangements had been provisional, but, on receiving the invoice dated December 31, they booked freight definitely. But the oil was, in fact, not ready for shipment until January 2, and by that time the steamer had sailed. The oil had been inspected by the defendants' Manager, but at that time it was not packed in the manner provided for by the contract, but was in various receptacles ready for inspection. The arrangements for shipping the oil having thus broken down, defendants refused to accept the oil as a delivery under the December contract, and this action was brought to enforce the claim of the defendants.

Before considering the law on the subject, it may be well to say a few words on the facts. The defendants were no doubt naturally annoyed that their arrangements for shipping the oil had broken down, but they themselves were really to blame for this result. Had they made any inquiry from the plaintiff as to the precise date when the oil would be available, or had they intimated to the plaintiff the provisional arrangements they had made with regard to freight, there seems little doubt that the oil might have been ready in good time. There is, indeed, a peculiar circumstance in the relation of parties to such a contract. The buyer may nominate a ship, but the seller may decline to get the goods ready, or to supply them at all up to the end of the month. The solution is that it is implied that there will be between the two parties an interchange of inquiries either by post, or by word of mouth, or by telephone, so that the necessary arrangements may be mutually adjusted. The buyer might inquire: "When is the oil likely to be ready?" The seller might intimate: "I am making arrangements to ship the oil on a certain date, will it be ready at that time?" But in the present case nothing of this sort was done. It was understood that the oil would be ready in the last few days of the month, and both buyer and seller left the question of further adjustment to drift. We have consequently to inquire, what is the strict legal position?

Now, in this case, the plaintiff to a certain extent rests his case upon custom. He claims that by the local mercantile custom certain

conditions are annexed to contracts of this description. These conditions have, indeed, recently been codified by the Chamber of Commerce, and it is definitely stated by two mercantile witnesses that this codification crystallizes the existing custom. That codification, however, took place after the breach complained of in this action, and we must look to the definite oral evidence of custom called by the plaintiff, and, in particular, to that of Mr. Frei. Mr. Frei states clearly that in contracts of this description, the custom is for the buyer to nominate a steamer, and for the seller to get the goods ready for shipment by that steamer. The goods, according to Mr. Frei, are, according to the custom, not made ready until the nomination is received. The nomination must be given within a reasonable time, so as to allow the sellers to put the goods into a deliverable state. There is some difference between the two witnesses called by the plaintiff. Mr. Frei contemplates two notices—one, a notice to inspect the goods; another, a notice that the goods are ready for delivery. The other witness called by the plaintiff seems to contemplate only one notice, but the difference is not really material, because, in the present case, it is clear that two notices are contemplated. The evidence of Mr. Frei seems to be quite clear, that custom does annex to a contract of this description a condition that the buyer shall give notice of the steamer to the seller, but even in the absence of such evidence, I should be of opinion that this was implied by the terms of the contract. When the contract says that delivery shall be made within a certain time f.o.b., it is clearly implied that the buyer will nominate a steamer on board which the delivery is to be made. It seems also implied from the circumstances of the case that the nomination will be given within a reasonable time, so as to allow of the goods being put into a deliverable state.

We are, therefore, in this position: Plaintiff was ready and willing, at a time within the interval stipulated for, viz., the month of December, on receiving reasonable notice that freight had been secured on board a steamer, to deliver the goods free on board the steamer. The defendants failed to give the necessary notice. They did, indeed, after the month had expired, give a notice, which was not a reasonable notice. I express no opinion on the point whether the sellers might have refused altogether to accept this notice. However, they did accept it, and endeavoured to get the goods ready, but the goods could not be got ready in time. They then bring this action calling upon the defendants to pay for the oil which they had ordered. The defendants, on their side, set up an entirely different interpretation. They say, on this contract it was for the sellers to take the initiative; we could not fix anything; it was for the seller to tell us that the oil was ready; it was for them to declare the oil ready for inspection or shipment, and for us then to find freight; and, indeed, the contract itself provided that if defendants did not find freight, the sellers, having given us notice of inspection,

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could put the oil into a deliverable state and call upon us to pay within three days. I will not say that this is not a possible interpretation of the contract, but if it were the true interpretation of the contract, then the codification of local mercantile custom recently enacted by the Chamber of Commerce would not be a crystallization of that custom, but a revolution. The experts are clear that it is a crystallization, and it appears to me that the evidence of custom given by Mr. Frei must be accepted, and that, if the contract be read in the light of that custom, it is clear that the true interpretation of the contract is that which I have above stated, and not the interpretation which, not without plausibility, is suggested by the defendants.

Mr. Drieberg, however, carries the argument further. He says, even though it be assumed they were bound to give reasonable notice of the steamer and failed to do so, nevertheless, even so, the plaintiffs have failed in their obligations. They were under an obligation, so he contends, to put the oil into a deliverable state before the expiration of December 31, and to put it at defendants' disposal before that time. This obligation, he says, was the essence of the contract. If this had been done, and if the oil had been ready packed as contracted for by the end of December 31, it could easily have been shipped on the steamer for which defendants had secured freight. From what source does Mr. Drieberg get this supposed obligation on the part of the plaintiff to have the oil ready for shipment by the evening of December 31? He gets it from a clause in the contract, which runs as follows:—

> " Payment against mate's receipts; but, in the event of shipment being in any way hindered by buyers, payment shall be made not later than three days after notice has been given buyers that the oil is ready for shipment, due notice being given them when it is ready for inspection. "

From this clause Mr. Drieberg wishes us to deduce the obligation suggested. This argument, however, is based upon what in my view is a misconception of the place of the clause in the scheme of the contract. This clause merely deals with the question of payment. Payment ordinarily is to be made on mate's receipts, but, in the event of anything being done by the buyers to hinder shipment, the contract gives the sellers the right, after first giving due notice that the oil is ready for inspection, to get it ready for shipment, and, having given notice of shipment, to call upon the buyers to pay within three days. This is a privilege which the clause confers upon the sellers; it is not an obligation which it imposes upon them. I do not think any such obligation can be deduced from this clause, all the more so, as the suggested obligation is quite inconsistent with the course of business described by Mr. Frei, who says explicitly that it is usual for inspection to take place before the goods are made finally ready for shipment.

Only one other point was raised : the question of damages. This was a forward contract. The only evidence of the loss sustained by the plaintiff was evidence of another forward contract made by himself early in January for delivery at the end of February. Mr. Drieberg argues that he ought to have evidence of the free market price at the date of the breach. But the evidence is that there was no such market price. It is agreed that the market was falling, and it appears clear that the only method of testing the extent to which the market had fallen, and consequently the loss of the plaintiff, was by comparing the price of this forward contract with a similar forward contract. I think, therefore, that the learned District Judge, who has gone very fully into the matter, was justified in acting on this evidence.

In my opinion, therefore, the appeal must be dismissed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.