Present: Ennis and Porter JJ.

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106—D. C. Colombo, 100.

Agreement to deliver copra—Only a portion delivered—Is payment for deliveries made condition precedent to right to claim deliveries of balance ?

To decide whether one party to a contract is relieved from his future performance by the conduct of the other, and whether payment of a previous delivery is not a condition precedent to the right to claim subsequent deliveries under the contract, one must look into all the circumstances of the case.

THE facts are set out in the judgment of the District Judge (M. S. Shresta, Esq.):—

There were two contracts between the parties, one of September 17, 1920, and the other of October 4, 1920. On the first contract 500 candies had to be delivered of No. 1 quality during September-October and on or before November 15 in equal quantities, payment against each delivery. It was contended that each instalment should have been of about one-third of 500 candies, and, judging from the wording of the contract which is not, however, free from ambiguity, that contention appears to be sound. If that contention is sound, the defendant was not entitled to any payment at all, because he had not delivered even one-third of 500 candies. If this contention is not sound, nevertheless, in my opinion, the plaintiff has not committed any default justifying the failure of the defendant in delivering the copra which he had bound himself to supply.

The first delivery was on September 24. There is evidence led by the plaintiff to the effect that the delay in payment on that delivery was due to a dispute regarding the quality of the copra delivered.

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The plaintiff says that he paid for the copra, delivered ultimately at the instance of his brother. As regards the second delivery which was on or about October 11, payment was made on the very next day, and there is evidence of the defendant himself to the effect that payments were all made on receipt of the storekeeper's receipt, and the receipt for this delivery is dated October 11.

The payment for the delivery of October 12 was made on the same day. As regards the delivery of October 22, money was on that day due to the plaintiff from the defendant on account of copra purchased by the defendant.

Therefore, correctly speaking, the defendant could not claim payment on account of that delivery. On October 23 some of the copra which the defendant had purchased was weighed out though delivery was made later. This explains, according to the learned counsel for the plaintiff, and the explanation seems to me to be a sound one, why the defendant gave a cheque on October 25 without deducting the copra of November 17 that was not up to quality, which is shown by voucher (P 11) of November 18, 1920, signed by the agent of the defendant, and acknowledged by the defendant to be genuine. Particulars of the amount appear on P 11 on the opposite page, and according to these particulars the delivery of that date was not up to quality. On November 18 the payment was made for the delivery of the 17th. P 21 shows that there was a deduction made on account of the quality of the delivery of November 17. (P 23) shows that the quality of the delivery of November 18 was also bad, and (P 22) shows the delivery of November 27 was also defective.

Thus it appears that on November 15, on which date the time for fulfilling the contract expired, there was no default on the part of the plaintiff. Even if it is held that the plaintiff was bound to make immediate payment, the plaintiff would have been fully justified in throwing up the contract on November 15. It is to be noted that no part of the copra due on the second contract was delivered by that date, in fact not up to date.

It was contended by the learned counsel for the defendant that the two contracts form one transaction, and that defendant was entitled to refuse to carry out the second contract, because of the default on the part of the plaintiff in respect of the first contract. Even if there had been such a default on the part of the plaintiff as regards the first contract, it appears to me there is no justification for the failure of defendant to carry out the second contract which was embodied in a different document, and did not form part of the same transaction as the first contract.

It is evident that the fault was all on the side of the defendant, who, apparently, was not in a position to supply the copra which he had contracted to supply. The price of copra was steadily rising as is shown from the fact that his second contract was entered into a fortnight later stipulating the price as Rs. 120, that is to say, about Rs. 14 more than the price given on the first contract. There is strong evidence to show that the price of copra continued to rise even after the second contract. Evidently, the defendant found he could not, without incurring much loss, supply the copra as stipulated in the contracts. This appears to me the real explanation for the non-delivery of the copra by the defendant.

. . . . . .

The total quantity which had to be delivered under the two contracts was 700 candies, and the quantity actually delivered was 96 candies.

There is thus a great disparity in the quantity delivered, which bears out the plaintiff's case that the defendant was not in a position, or purposely neglected, to deliver the quantity which he had contracted to deliver.

As I have already stated, the plaintiff was entitled after November 15 to refuse to receive any more copra from the defendant, because the time for delivering the copra on the first contract had at that date expired. This fact must be taken into consideration in deciding whether the non-payment on account of deliveries of November 18 and 27 was so great a default on the part of the plaintiff as to justify the defendant's refusal to supply further copra . . . .

If there was any delay on the part of the plaintiff in paying for the first five deliveries, that fault was condoned by the defendant by his subsequently having supplied further copra, and it is too late for the defendant now to complain of any delay of payment in respect of those deliveries.

Section 30 of the Sales of Goods Ordinance, No. 11 of 1896, makes it clear that delay in payment for any delivery cannot be necessarily made a reason for the repudiation of the contract. Every case must be decided on its own merits, and there is the case of *Mersey Steel & Iron Co. v. Nailer*,[1] *p. 829 of Benjamin on Sales*, which, though it was delivered before Sales of Goods Act, still appears to be a leading case on the point, and explains how section 30 referred to above should be construed. There was no intention on the part of the plaintiff to repudiate the contracts in question.

I answer the issues as follows:—

(1) No. I should have said earlier that a few days' delay in making payments would not be a breach of the terms of the contract. There is a failure to make payments on account of the last two deliveries, but that failure was justified in the circumstances proved. The quality of the copra supplied on the last two days was defective.

Bawa, K.C. (with him *M. B. A. Cader*), for the defendant, appellant.

E. W. Jayawardene (with him *E. G. P. Jayatileke* and *Weerasooriya*), for the respondent.

November 6, 1922. ENNIS J.—

This was an action for damages which arose in these circumstances. The plaintiff asserted that by a contract of September 17, 1920, the defendant undertook to deliver 500 candies of copra in the months of September and October, 1920, at the price of Rs. 106 per candy. He says that 96 candies were delivered under this contract, and makes a claim for damages based on 388 candies not delivered, which he bought in at Rs. 132.50 per candy. On this contract he claims Rs. 8,085.83. He further says that on a contract entered into in October, 1920, the defendant undertook to deliver before November 30, 200 candies of No. 1 copra at the price of Rs. 120 per candy and that the defendant delivered nothing in pursuance of this contract, upon

[1] *(1882-84) 9 A. C. 434.*

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which the plaintiff bought in at Rs. 132.50 per candy. He claims a further Rs. 2,528.12 damages on this contract, making, with interest in all, the sum of Rs. 10,735.13. The defence was that the plaintiff had failed to pay promptly on each delivery. On the facts the learned Judge has found against the defendant, and he appeals.

On appeal it was pointed out that the contract stipulated for payment upon delivery in the one case, and payment against each delivery in the other. The defendant put in a document (D 11) to show when deliveries were made and when payments were made. The learned Judge has analysed this document, and has come to the conclusion that the payments were made within a reasonable time, and that, notwithstanding the date of delivery mentioned in the document (D 11), the storekeeper's receipts upon which payments are made appear to have been dated some days after the dates mentioned in D II, as, for instance, the item " October 8, a delivery of 141 candies." The learned Judge points out that the delivery was on or about October 11, and that the receipt for the delivery is dated October 11. The payment appears to have been made on October 12. Quite apart, however, from the finding of fact that the plaintiff made payments within a reasonable time, it appears that the market was rising against the defendant from the time of the contract until the time when he refused to make any further deliveries. Moreover as the learned Judge has pointed out, the rule of law as found in section 30 of the Sale of Goods Ordinance, No. 11 of 1896, shows that the question in each case depends on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract; and this is in effect the finding in *Mersey Steel & Iron Co. v. Nailer* (*supra*), in which it was said that one must look to the circumstances of the case in order to say whether one party to the contract is relieved from his future performance by the conduct of the other, and that payment of a previous delivery was not a condition precedent to the right to claim subsequent deliveries. In the circumstances there is no good reason to interfere with the judgment appealed from.

One circumstance requires to be mentioned. It appears that the plaintiff put in evidence two letters (P 1 and P 2). P 1 is dated October 23, 1920, in which he complained of failure on the part of the defendant to make sufficient deliveries under the contracts. The defendant denied the receipt of these letters, and in his turn produced the press copy book containing the letter D 7, which he said had been written to the plaintiff on October 28, 1920, in which he complained about delay in payment. The learned Judge has found that P 1 must be presumed to have been received by the defendant, and with regard to the defendant's document (D 7) he regards it as a fabrication, and made for the purpose of defending himself against any action the plaintiff might take.

It would seem, in any event, that the plaintiff was the first to complain, and in view of the state of the market, the probabilities support the plaintiff's contention, and the finding of the learned Judge that the default was on the part of the defendant and not of the plaintiff.

I would dismiss the appeal, with costs.

PORTER J.—I agree.

Appeal dismissed.