Present: De Sampayo and Schneider JJ. 1922.

POOVILANGAM CHETTY *v.* ANTHONY.

215—D. C. Colombo, 3,077.

Contract to deliver naked mill oil at buyer's store.—Oil sent in big casks which buyer was unable to unload—Seller not bound to unload, or send oil in smaller casks ?

Plaintiff entered into a contract to supply to defendant, at his store, fifty tons of " naked " oil, *i.e.*, the oil was not to be delivered in packages or casks, but the defendant was to receive the oil and put it into his own vessels at his store. The plaintiff sent the oil in big casks, which defendant was not able to unload.

Held, it was not plaintiff's duty to unload, and that it was not plaintiff's duty to send it in smaller casks.

THE plaintiff-respondent sued the defendant-appellant for the recovery of a sum of Rs. 5,765 as damages due to him by reason of an alleged failure on the part of the defendant to accept fifty tons of oil in terms of an agreement between the parties.

The defendant filed answer denying that the plaintiff made a legal tender of the oil, or that there was a breach of agreement on the part of the defendant. The defendant further claimed in reconvention a sum of Rs. 3,410.94 as damages sustained by him by reason of the plaintiff's failure to deliver the oil.

At the trial the following issues were framed:—

(1) Did plaintiff fail to tender the oil ?

(2) Did defendant wrongfully refuse to accept the same ?

(3) What damages, if any, have either party suffered ?

(4) Did the plaintiff deliver the oil according to the contract ?

The District Judge, after stating the facts, continued as follows:—

The terms of the contract were that the plaintiff should deliver fifty tons of ordinary naked mill oil, of good merchantable quality, according to sample, at defendant's store at Mutwal, before October 5, 1921, at Rs. 29.50 per cwt., less duty.

It is clear, from the evidence that the plaintiff had the oil ready for delivery, that in fact he tendered oil in pursuance of the terms of the contract to the defendant, and that the defendant refused to accept it.

The defendant admits that the oil was tendered, but his contention appears to be that owing to the fact that the machinery at his disposal, for taking delivery of the oil, was out of order, the plaintiff should have complied with his request that the plaintiff should deliver the oil to him in small barrels, which he (defendant) would supply himself to the plaintiff.

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Now, the contract required the plaintiff to deliver "naked" oil, that is to say, merely oil, and not any vessels to contain it, and so long as the plaintiff delivered the oil at the defendant's store in his own vessels, he had fulfilled the requirements of the contract in regard to delivery.

The plaintiff did deliver the oil at the defendant's store, but the defendant refused to accept it for the reason stated above, and it appears to me that by such refusal the defendant committed a breach of the contract.

The plaintiff was, however, perfectly willing to oblige the defendant, and supply the oil to him thereafter in the defendant's own vessels, subject to the conditions that he should not be responsible for any leakage in course of transport, and that the oil should be examined and passed by the defendant at the plaintiff's premises before it was put into the defendant's vessels.

Those conditions were quite reasonable ones, for, as the plaintiff states, he could not tell what leakage might take place in the defendant's vessels, nor could he rely on the defendant's vessels being in such a condition that the oil would not be contaminated by reason of the presence of impurities in those vessels.

The District Judge answered issues (1), (2), and (4) in favour of plaintiff, and gave judgment for him as prayed for, and dismissed defendant's claim in reconvention.

The defendant appealed.

Samarawickreme (with him *Wijewardene*), for defendant, appellant.

Hayley (with him *Canjemanadan*), for plaintiff, respondent.

December 4, 1922. DE SAMPAYO J.—

This is an action for breach of contract. The defendant, by a written contract entered into through a broker, agreed to buy from the plaintiff, who is a millowner, "fifty tons ordinary naked mill oil, of good merchantable quality, delivered at buyer's store, before October 5, 1921." The plaintiff brought this action for damages on the ground that the defendant failed to take delivery of the oil though tendered by him. On the other hand, the defendant's defence is that plaintiff failed to make delivery of the oil contracted for, and he claims in his turn a sum of Rs. 3,410.94 in reconvention as damages for plaintiff's breach of the contract. It appears that the significance of the word "naked" in the description of the goods in the contract is that the oil was not to be delivered in packages or casks, but that the defendant was to receive the oil and put it into his own vessels at his store. The difficulty between the parties arose from a tender of four tons of oil on September 22, 1921. The plaintiff sent these four tons in four big casks, one in each cart. They were taken to the defendant's store, but it would seem that there was a conversation between the defendant's manager and the carters as to the possibility of unloading the casks on to the defendant's store or the platform . . . . The

manager remarked that the crane that was there was out of order, and would not be able to lift a cask of the weight of the casks in which the oil was sent. The carter himself would seem to have looked at the crane and agreed that the crane was out of order. There was no suggestion as to any other way of taking delivery, and the carters took back the carts. Then ensued certain correspondence between the plaintiff and the defendant. In a letter written by the defendant on September 27, referring to the incident of September 22 at his store, he repeats that his crane was out of order, and suggests that plaintiff may put the oil into casks that defendant himself would send to the plaintiff's mills. Throughout the correspondence and the conduct of the parties it would seem that the defendant's standpoint was that the casks, big or small, in which the oil would be sent must be unloaded into his store or yard. I do not think there was any obligation on the part of the plaintiff to do that. He was simply to deliver naked oil, and it was the defendants lookout to receive and pour into such vessels as he chose, but as regards the defendant's suggestion by his letter of September 27 the plaintiff was agreeable, and he said he would put the oil into defendant's own casks if sent to his mills, but said that he could not guarantee the condition of defendant's casks, and wished the defendant to be responsible for any leakage during transit from the plaintiff's mills to the defendant's store. It seems to me that this was a reasonable request on the part of the plaintiff, but the defendant did not accept the suggestion, but insisted on the oil being sent to his store in smaller vessels, so that he may in his turn fulfil a contract which he had entered into with a foreign firm. There is no question that the plaintiff had the quantity of oil ready for delivery all the time. In fact he was anxious that defendant should take delivery of the oil because as he indicated in one of his letters, the oil was accumulating in his mills and causing him inconvenience. In the later correspondence the plaintiff informed the defendant of that fact, and stated that he was ready to deliver the quantity according to the contract, and asked for instructions. In fact, in the letter he said: " I herewith tender to you fifty tons, " but there was no response of a favourable kind from the defendant, and the plaintiff was thereafter obliged to sell the oil at a public auction, at which a lesser amount than the contract price was realized, and he now claims the difference. It is further objected by the defendant that, although the plaintiff may have had a sufficient quantity of oil to be delivered, he did not, in fact, tender delivery after the trouble over the first four tons, but I think the clear conclusion from all the correspondence is that the defendant was not willing to accept delivery except in the form and manner he insisted upon. So, practically, there was a failure to accept the oil in terms of the contract. Another point taken by counsel is that, as a matter of fact, some part of the oil

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that plaintiff proposed to deliver to the defendant was not good merchantable oil of the quality contracted for. It appears that when the difference arose between the plaintiff and the defendant, the plaintiff took the precaution to get Mr. Simpson of the Chamber of Commerce to inspect the oil in his mills and to report. Mr. Simpson made a report certifying to the fact that there were fifty-four pipes containing fifty tons of oil, but he added that they were good, merchantable, ordinary oil, except five pipes, which, however, the plaintiff was willing to replace. Mr. Simpson did not appear personally in Court, but even accepting as proved that the quality of five pipes was not in accordance with the contract, this is a mercantile transaction, and the plaintiff was within his right to replace any portion that was objected to as being inferior. The fact is that no difference arose between the parties on such a ground. The point has not been well investigated, and I do not think that a defence to the plaintiff's action arose from the report of the surveyor. I think, on the issues framed, the District Judge's judgment is quite right, and in my opinion this appeal fails, and should be dismissed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.