Present: Pereira J. and Ennis J.

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CARUPPEN CHETTY *et al.* *v.* HABIBHOY.

191—D. C. Colombo, 33,725.

Contract—Repudiation of contract—Promisee may at his option treat whole contract as at an end and sue for all damages, or treat it as subsisting and sue for portion of damages already incurred—Measure of damages—Res judicata.

Defendant, who agreed to supply the plaintiffs with thirty bales of sarees and dhooties per mensem for one year from September 1, 1910, made default in supplying the bales in the months of October and November. Plaintiffs thereupon instituted an action for damages, and recovered damages (Rs. 1,500) for the two months.

Plaintiffs subsequently brought this action to recover damages for the non-delivery of the bales for the following months.

Held, that plaintiffs were not barred from instituting the present action, as plaintiffs had the option (assuming that defendant had repudiated the contract before the first action) of treating the contract as subsisting and claiming damages for each default, or of treating the whole contract as at an end and claiming damages in respect of the whole contract.

Observations by Pereira J. as to damages recoverable in a case of this kind.

AN appeal from a judgment of the Additional District Judge of Colombo (L. Maartensz, Esq.).

In this action the appellant, who is the proprietor of the Ceylon Spinning and Weaving Mills, was sued by the respondents for the recovery of a sum of Rs. 8,700 damages alleged to have been sustained by them in consequence of the failure on the part of the appellant to supply them with certain sarees and dhooties in terms of the contract marked A and dated August 24, 1910, entered into between the respondents and one Thomas Marsden.

This action was for the failure to deliver sarees and dhooties during the eight months January to August, 1911, and there having been a previous action, case No. 31,911 of the District Court of Colombo, on the same contract for failure to supply goods during the months of November and December, 1910, the appellant contended that the judgment and decree in that action (No. 31,911) barred this action. The appellant further contended that Marsden, the so-called manager of these mills in Colombo, had no authority to bind him by a contract for the future supply of the produce of the mills, and that even if he had, the damages claimed were in the circumstances grossly exaggerated and excessive.

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The parties went to trial on the following issues:—

(1) Is the defendant entitled to plead Marsden's want of authority to execute the contract of sale by reason of the decree in case No. 31,911?

(2) If not, had Marsden authority to enter into the contract sued on?

(3) Damages.

(4) Is the claim barred by the decree in case No. 31,911 by reason of the provisions of sections 34 and 207 of the Civil Procedure Code?

The District Judge entered judgment for the plaintiff. The defendant appealed.

R. L. Pereira, for the defendant, appellant.—When case No. 31,911 was instituted the appellant had entirely repudiated the contract sued on. In the first action plaintiffs should have sued for continuing damages. Having failed to do so, they are barred from bringing another action. Counsel cited *11 N. L. R. 348, 1 Bal. 146, 5 N. L. R. 259, 12 Cal. 339.*

Marsden had no authority to enter into this contract. In the first action that objection was not waived. In any case it is open to the defendants to raise the objection in this action.

The plaintiffs are not entitled to the damages they claim. They did not endeavour to secure similar goods elsewhere. Similar goods were obtainable from the Carnatic and Buckingham Mills in Madras, and not having attempted to obtain them thence, the respondents were not entitled to their exaggerated claim for damages.

The appellant himself was prepared to sell the goods at Rs. 6 over the contract price. He had sold at that price to other Chetties.

H. J. C. Pereira (with him *F. M. de Saram*), for the plaintiffs, respondents.—The defendant cannot raise the question of Marsden's authority in this case. The point was expressly taken in the previous action No. 31,911, and was raised as an issue, but the defendant did not press it. It is not open to him to raise it in this case.

The action is not barred by sections 34 and 207 of the Civil Procedure Code. The contract is divisible; an action could be brought for each month's failure to deliver the sarees and dhooties. It is open to the plaintiffs to treat the whole contract as at an end and to sue for the entire damages, or to sue the defendant for the non-delivery of goods when each breach occurs. Counsel referred to *Roper v. Johnson.*[1]

There was no available market in Ceylon in which the plaintiffs could have bought the goods.

[1] *L. R. 8 C. P. 167.*

R. L. Pereira, in reply.—There was an available market in Madras. It is not unreasonable to expect him to buy there. Counsel cited *Benjamin on Sale 986-986 and 909.*

Cur. adv. vult.

August 6, 1913. PEREIRA J.—

In this case the plaintiffs sued the defendant for the recovery of the sum of Rs. 8,700, being damage alleged to have been sustained by the plaintiffs by reason of a breach by the defendant of a contract entered into between the parties for the supply by the defendant to the plaintiffs of certain sarees and dhooties. The contract was entered into on August 25, 1910, and by it the defendant agreed to supply the plaintiffs with three hundred and sixty bales of sarees and dhooties within one year, that is to say, from September 1, 1910, to August 31, 1911, at the rate of thirty bales a month. The defendant made default in supplying the sarees and dhooties in the months of October and November, 1910, and thereupon the plaintiffs instituted action No. 31,911 in the District Court of Colombo for the recovery of Rs. 1,500 as damage. That action was instituted on January 7, 1911, and in appeal judgment was entered in it in the plaintiffs' favour for the amount claimed. In that action the defendant in his answer raised the question whether the contract referred to above was duly entered into, that is to say, whether one Thomas Marsden, who had signed the contract on the defendant's behalf, had the authority of the defendant to do so. At the trial, however, the defendant's counsel stated that he "did not intend to press the matter." In other words, he assented to the case proceeding on the footing that Marsden had the authority of the defendant to enter into the contract on behalf of the defendant. The same objection was raised in this case, and in that connection the question arose whether, with reference to it, the judgment in the older case could not be pleaded as an estoppel by way of *res judicata*. An order made of consent in a case operates as much as an estoppel as an order made after adjudication on evidence, and the question involved in the present case is quite covered by the authority of the decision of the majority of the Court in *Samitchi v. Pieris*,[1] and I think that the defendant is estopped from pleading in this case that Marsden had no authority to enter into the contract sued on.

Another question raised in this case is whether the plaintiffs' claim is not barred by the decree in case No. 31,911 by reason of the provisions of sections 34 and 207 of the Civil Procedure Code. Under the former section every action should include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action pleaded, and under section 207 (see explanation)

[1] *(1913) 16 N. L. R. 257.*

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every right to relief of any kind which can be claimed in an action upon the cause for which it is brought becomes a *res judicata*, which cannot afterwards be made the subject of action for the same cause between the same parties. Now, it is said that the defendant repudiated the contract in question before action No. 31,911 was brought, and that therefore the contract was then at an end, and that the plaintiffs should in that action have sued for damages in respect of a breach of the whole contract, and that having sued for damages for two months only, they must be deemed to have been barred from instituting the present action by reason of the sections of the Code cited above. Assuming that there was repudiation of the contract before the institution of action No. 31,911, it must be remembered that (and here the English law applies) the plaintiffs had the option of treating the whole contract as at an end, and claiming damages in respect of a breach of the whole contract, or of treating the contract as subsisting and claiming damages for each default thereunder committed by the defendant. In *Muller v. Brown*,[1] Kelly C.B., with reference to a repudiation similar to that with which we are here concerned, observed: " The plaintiff might, if he had so elected, have treated the contract as at an end when the defendant announced his intention to break it. That is a matter of election on the plaintiff's part." And in *Roper v. Johnson*,[2] Keating J., in similar circumstances, observed: " The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance, but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time."

In the present case the plaintiffs would appear to have elected to treat the contract as subsisting, and to sue for damages on the occasion of each default. That being so, sections 34 and 207 of the Civil Procedure Code have no application to this case.

Now, as regards the amount of damage, it has been said that the plaintiffs are not entitled to damage in respect of each separate default. But in the case of *Muller v. Brown* [1] cited above, the plaintiff bought of the defendant five hundred tons of iron to be

[1] *L. R. 7. Ex. 319, 323.* [2] *L. R. 8 C. P. 167.*

delivered in about equal proportions in September, October, and November, 1871, and it was held that the proper measure of damages was the sum of the difference between the contract and market prices of one-third of five hundred tons on September 30, October 31, and November 30, respectively. And in *Roper v. Johnson* [1]—a case in which the plaintiff had elected to treat the contract as at an end—Brett J. observed (p. 180): " Although the plaintiff may treat the refusal of the defendant to accept or to decline the goods before the day of performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach. It appears to me that what is laid down by Cockburn C.J. in *Frost v. Knight* [2] in the Exchequer Chamber involves the very distinction which I am endeavouring to lay down, viz., that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages; when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not the time of breach."

Now, as to the measure of damages. Section 49 of Ordinance No. 11 of 1896 enacts (1) the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract (sub-section (2)); (2) where there is an available market for the goods, the measure for damage is *primâ facie* to be ascertained by the difference between the contract price and the market price of the goods at the time or times when they ought to have been delivered (sub-section (3)). These provisions are identical with the corresponding provisions of the English Act, and in this connection I may say that in the case of *Roper v. Johnson* [1] cited above Grove J. observed as follows (p. 182): " The plaintiffs having made out a *primâ facie* case of damages, actual and prospective, to a given amount, the defendant should have given evidence to show how and to what extent that claim ought to be mitigated." In the present case the attitude taken up by the plaintiffs apparently was that the measure of damages applicable was that mentioned in sub-section (2) of section 49 of the Ordinance, and the defendant has, in my opinion, failed to show that sub-section (3) applied, and that under it there was reason to mitigate the claim made by the plaintiffs. The plaintiffs, by the evidence led by them, have shown that the damage claimed by them is the loss directly and naturally resulting in the ordinary course of events from the defendant's breach of contract. In the older case—No. 31,911—it appears to have been admitted that there was no available market for goods similar to those forming the subject of the present contract. The Chief Justice in his judgment in that case observed: " It is admitted that in the ordinary sense of the expression there was no available

[1] *L. R. 8 C. P. 167.*

[2] *7 Ex. 111.*

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market for the goods of this particular type," and he effectually disposed of the contention that the plaintiffs should have applied to the defendant himself for these goods on terms more favourable to the latter; and damages were allowed to the plaintiffs in the older case on the footing that they were entitled to the loss that had directly resulted from the defendant's breach of contract, regardless of the market price, if any, of goods similar to those in question. In the present case, as regards available markets, the defendant's witness, Mr. Marsden, says no more than that Darley, Butler & Co. were selling sarees and dhooties, " exactly similar to those contracted for, in 1908," that in 1912 Finlay & Co. were selling similar sarees and dhooties in Ceylon, and that similar sarees and dhooties were being made in India by the Carnatic Mills and Buckingham Mills in 1910 and 1911, and he gives no information as to the prices, and has sworn to no facts that would justify a mitigation of the claim made by the plaintiffs. The second plaintiff, on the other hand, swears that these sarees and dhooties are only manufactured by the defendant; and while he admits that Nagappa was selling sarees and dhooties at certain prices, it is clear that Nagappa was a mere retail dealer, who himself obtained his sarees and dhooties on a contract with the defendant. In the circumstances, I do not think that there is any reason to reduce the amount claimed by the plaintiffs as damage. I would affirm the judgment appealed from with costs.

ENNIS J.—

I agree. The measure of damages in an action on contract for non-delivery of goods is the difference between the contract price and the price at which goods of a similar kind could be bought in the market at the time delivery was due. In this case there is some slight evidence of a market for the goods, but no evidence of the price at which such goods could be bought. The plaintiff has given evidence that he made no inquiries whether similar goods could be purchased. He bases his claim on a possible profit he could have made had he sold by retail the goods contracted for.

I think that the onus of proof of circumstances in mitigation of the damage was on the defendant, and in the circumstances and in view of the previous case I would not interfere.

Affirmed.