1946 *Present :* **Howard C.J. and de Silva J.**

RAWANNA & CO., Appellant, *and* ARUNACHAPILLAI, Respondent.

285—D. C. Colombo, 14,064.

Sale of goods—Buyer's liability for non-acceptance of delivery—Quantum of proof necessary on seller's part—Sale of Goods Ordinance (Cap. 70), s. 37.

Before a buyer can be held liable to the seller for any loss occasioned by his refusal to take delivery of goods sold there should be evidence that the seller was ready and willing to deliver the goods and that he requested the buyer to take delivery.

APPEAL from a judgment of the District Judge of Colombo.

N. Nadarajah, K.C. (with him *C. Renganathan*), for the plaintiff, appellant.

H. V. Perera, K.C. (with him *N. Kumarasingham*) for the defendant, respondent.

Cur. adv. vult.

May 29, 1946. HOWARD C.J.—

This is an appeal by the plaintiff from an order of the District Judge of Colombo dismissing the plaintiff's claim and entering judgment in a sum of Rs. 25 with costs on Court of Requests scale on the defendant's claim in reconvention. The plaintiff claimed a sum of Rs. 802·50 of which Rs. 100 was alleged to have been given as an advance against the price of 600 bushels of kurakkan which the defendants sold to the plaintiff by a contract in writing dated March 24, 1942. The remaining Rs. 702·50 was claimed as damages for non-delivery of 562 bushels. The contract is contained in the document P 1 and with regard to the time of performance it states " delivery on or before April 7 ". The plaintiff in his evidence stated that on April 6 he asked for the whole quantity, but was told that only 38 bushels could be spared that day. On April 7 he, therefore, took delivery of 38 bushels on the promise of the defendants to give the balance in a day or two. Plaintiff delivered the 38 bushels to one Marker who was the person who had bought from him. The plaintiff also states that on April 7 he had made up his mind to go to India. On the 8th he endorsed the contract P 1 asking the defendants to deliver the kurakkan to Marker. He also says that the defendants agreed to deliver to Marker within 4 or 5 days. On April 8 the plaintiff went to India and did not return until June. Mr. D. H. Marker who describes himself as a Commission Agent and Merchant gave evidence in support of the case put forward by the plaintiff. He states that the plaintiff on April 7 delivered the 38 bushels of kurakkan to him and handed the contract for the remaining 562 bushels. He also says that he wanted kurakkan in April and was prepared to take over the whole of the 562 bushels. He sent on April 7 and several times to the defendants to fetch the 562 bushels, but the latter kept putting him off. When the kurakkan was not delivered he sent a telegram dated May 11, 1942, (P 7) to the plaintiff in India informing the latter that the defendants were not supplying kurakkan on the contract and asking for instructions to buy on plaintiff's account. On June 22, 1942, the plaintiff's proctor by P 9 wrote to the defendants requesting delivery of the 562 bushels of kurakkan and claiming damages in default of such delivery. By P 10 the defendants' proctor replied to P 9 and stated that the defendants were ready and willing to deliver on the due date but the plaintiff refused to take delivery though requested to do so. In consequence of such failure to take delivery it was maintained that the defendants were compelled to sell the kurakkan below the price at which the plaintiff had agreed to purchase. The defendants had therefore suffered damages for which the plaintiff was held liable.

The learned District Judge seems to have experienced considerable difficulty in arriving at his verdict. He has found that the plaintiff failed to take delivery of the balance of 562 bushels. At the same time he finds that the defendants had no stocks to deliver. The learned Judge, therefore, thinks that the defendants are only entitled to nominal damages which he fixes at Rs. 25.

On a consideration as to which party has been guilty of a breach of contract, regard must be had as to what facts have been established by

evidence. It has been proved (*a*) that the defendants were unable to deliver the full amount of kurakkan on April 7, and were allowed further time to deliver the balance, (*b*) that delivery was to be made at the defendants' store, (*c*) that the balance of kurakkan was not actually available in the defendants' store. The first defendant states that on April 9 he had enough kurakkan to deliver on this contract. But this kurakkan amounting to 200 bags was in the Customs having come by the *Fingal* from Tuticorin. Before the defendants could succeed they must establish that the plaintiff has refused to take delivery of the kurakkan. In this connection section 37 of the Sale of Goods Ordinance (Cap. 70) is worded as follows :—

> "When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods :
>
> Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract".

There is no evidence in this case that either Marker or the plaintiff was requested by the defendants to take delivery. Inasmuch as the kurakkan was not actually in the store it cannot be said that the defendants were ready and willing to deliver the goods. In these circumstances it is impossible to support the learned Judge's finding that the plaintiff had been guilty of a breach of contract.

With regard to the plaintiff's contention that the defendants have failed to deliver the kurakkan when called upon by Marker to do so and thereby committed a breach of contract, it would appear that the learned Judge has without hesitation accepted the evidence of Marker. There is no reason to question his acceptance of that evidence, but it is difficult to reconcile such acceptance with a finding in favour of the defendants. Marker states that he wanted kurakkan in April and that he was prepared to take over the whole of the 562 bushels. That somebody was sent from his place to demand delivery. That he sent several times to fetch the 562 bushels. A witness called Bin Addam, a Natama under Marker, also testified to the fact that on April 7 and April 9 and on four or five subsequent occasions he went to the defendants' store to take delivery of the kurakkan and nothing was given. The evidence of Marker and Bin Addam proves conclusively that the defendants on being called upon to deliver the 562 bushels failed to do so and have thereby committed a breach of contract. The plaintiff claimed damages at the rate of Rs. 1·25 a bushel, the profit he states he would have made if delivery had been made to Marker. The latter in his evidence however states that he was prepared to pay for the 562 bushels and take them over from the defendant. That he thinks his price was Rs. 6·75. He also says that owing to the raid the prices were fluctuating and there was no fixed price from April 1 to 14. In my opinion the plaintiff should be allowed

damages at Rs. 6·75 less Rs. 5·75 a bushel, that is to say on 562 bushels a sum of Rs. 562. The order of the learned Judge is therefore set aside and judgment is entered for the plaintiff for Rs. 562 together with costs in this Court and the Court below.

DE SILVA J.—I agree.

Appeal allowed.