Present: Ennis and Porter JJ.

FERNANDO *et al.* *v.* MENDIS.

44—D. C. Colombo, 1,281.

Sale of goods—Refusal to pay by purchaser—Is it a ground for refusal to deliver balance due under the contract?

Where the purchaser claimed damages from the vendor for not delivering a portion of the quantity he agreed to sell, the vendor pleaded non-payment for goods previously delivered under the contract.

Held, that the real question was not whether there was a refusal to pay, but whether the circumstances of the case showed an intention to repudiate the contract.

"The refusal on the part of the defendant (purchaser) was not a mere failure to pay for some of the goods delivered, but a definite refusal on the part of the defendant to pay except upon terms, namely, that the plaintiffs should give a guarantee against any loss sustained on the consignment. Clearly such a stipulation is not within the terms of the contract, and a refusal to pay on that ground was a refusal to be bound by the contract, and would be a good ground for refusal to make further deliveries."

[1] *(1892) 2 C. L. R. 15.*

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PLAINTIFFS entered into contracts to supply defendant company on the first contract one hundred cases of medium desiccated coconuts at 29 cents per lb., and on the second contract fifty cases of fine and fifty cases of medium at 24½ cents per lb. The first contract was entered into on February 8, and the second on March 14, 1921. The time for delivery on the two contracts was extended till April 30, and defendant took delivery of the one hundred cases on contract A, and only paid for fifty of them. The plaintiffs allege that on March 23 they delivered fifty cases on account of contract A and fifty-five cases on account of contract B, viz., twenty-one medium and thirty-four fine, and on April 14 delivered sixteen fine, thus completing one-half of the contract B.

According to these deliveries defendant company had to pay them a sum of Rs. 4,024·96, and, giving defendant credit for a sum of Rs. 2,750 paid by him in respect of such deliveries, plaintiffs claimed the sum of Rs. 1,274·96.

The defendant joined issue with plaintiffs with regard to the deliveries of March 23 and April 1. His case was that on March 23 plaintiffs delivered sixty-nine cases medium and thirty-six cases fine, which were appropriated as follows, viz., fifty cases medium towards completion of contract A and nineteen cases medium and thirty-six fine in respect of contract B. On April 1 the sixteen cases fine, according to defendant, were appropriated as follows, viz., fourteen cases to contract B and two cases to another contract D entered between the parties on March 18.

Defendant further stated that the deliveries of March 23 were accepted only on the condition that plaintiffs would give them a letter of indemnity against loss defendant might sustain if the goods were found to be not of good merchantable quality, and that as plaintiff failed to give this letter, defendant withheld payment till he had ascertained his loss, if any.

One hundred cases delivered on March 23 were shipped by defendant to London, and the loss came to Rs. 167·25 on five of these cases. He further claimed Rs. 95·71 damages from plaintiffs for non-delivery of thirty-one cases on contract B. He admitted his liability to plaintiffs on contracts A and B for Rs. 899·52, but he counter-claimed Rs. 977·60 for non-delivery on contract D, and, giving plaintiffs credit for Rs. 899·52 as above, claimed in reconvention Rs. 78·08. The plaintiffs denied that they ever entered into contract D with the defendant.

The parties went to trial on the following issues :—

(1) Did plaintiffs on or about April 1, 1921, deliver sixteen cases of fine on contract B ?

(2) Did plaintiffs fail and neglect to deliver thirty-one or any cases medium against contract B, or were plaintiffs justified in not delivering the same, as previous deliveries had not been paid for ?

(3) If issue 2 is answered in favour of defendant, what damages, if any, is defendant entitled to ?

(4) Did plaintiffs agree to indemnify defendant against any loss he might sustain by the deliveries of March 23, 1921, as set out in paragraph 4 of the answer ?

(5) Did the defendant sustain a loss of Rs. 167·25 on the said deliveries, and are plaintiffs liable to pay the same ?

(6) Did plaintiffs enter into contract D ?

(7) Did plaintiffs deliver two cases on the said contract ?

(8) If issues 6 and 7, or either of them, be answered in favour of defendant, what damages, if any, is defendant entitled to by reason of plaintiffs' failure to fulfil contract D ?

(9) Was contract D pleaded in the answer a valid binding contract between plaintiffs and defendant ?

The District Judge (A. Beven, Esq.) held as follows :—

I hold that plaintiffs were justified in not delivering the balance cases on contract B, as defendant had not paid them for previous deliveries.

In my opinion plaintiffs are not liable to pay defendant Rs. 167·25 on the deliveries of March 23, 1921, as defendant took delivery and shipped the goods, thus acknowledging they were merchantable and of good quality before he asked for a letter of indemnity.

I answer the issues as follows:—

(1) Yes.

(2) Plaintiffs were justified in not making delivery of twenty-nine cases medium on contract B.

(4) No.

(5) Defendant has sustained a loss, but plaintiffs are not liable.

(6) No.

(7) No.

(9) No.

Pereira, K.C. (with him *Garvin*), for the appellant.

Jayawardene, K.C. (with him *L. H. de Alwis*), for respondents.

June 29, 1922. ENNIS J.—

In this case the plaintiffs sued for a sum of money in respect of desiccated coconuts sold on certain contracts. The learned Judge found in favour of the plaintiffs, and the defendant appeals. In answer the defendant claimed a sum of Rs. 95·71 for thirty-one cases medium desiccated coconut which he said the plaintiffs had not delivered under one of the contracts. The appeal is pressed

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only on the question of the claim for damages in the defendant's counter-claim, all the findings of the learned Judge on facts being accepted. It appears that the short deliveries were twenty-nine cases and not thirty-one. The learned Judge held that the plaintiffs were justified in not delivering the balance, as the defendant had not paid them for previous deliveries. It was urged that the learned Judge was wrong in law on this finding, and in support of this contention, Mr. Pereira, for the appellant, cited the case of *The Mersey Steel & Iron Co. v. Naylor Benzon & Co.*[1] It was held in that case that " upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery ; that the respondents had not, by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract, or so as to release the company from further performance." This argument was met by a number of cases being cited, all of which go to show that the real question in the case is not whether there has been a refusal to pay, but whether the circumstances of the case show an intention to repudiate the contract. The first of these cases cited to us was *Withers v. Reynolds*,[2] in which case there was an undertaking to deliver straw from time to time, and there was a refusal to pay on one instalment, the defendant insisting on keeping one payment always in arrear. Those facts were held to justify the plaintiff in refusing to deliver any more straw under the contract. The case of *Freeth v. Burr*[3] was the next case. In *re an Arbitration between Rubel Bronze & Metal Co., Ltd., and Vos*,[4] the rules which would apply in case of breach of contract justifying a repudiation of the contract were summed up, and the rule laid down in *Withers v. Reynolds* (*supra*) was emphasized. In the present case it would seem that the refusal on the part of the defendant was not a mere failure to pay for some of the goods delivered, but a definite refusal to pay, except upon terms, namely, that the plaintiffs should give a guarantee against any loss sustained on the consignment. Clearly, such a stipulation is not within the terms of the contract, and a refusal to pay on that ground was a refusal to be bound by the contract, and would be a good ground for refusal to make further deliveries. In my opinion the present case comes within the principle of *Withers v. Reynolds* (*supra*).

I would accordingly dismiss the appeal, with costs.

PORTER J.—I agree.

Appeal dismissed.

[1] *(1883–84) 9 A. C. 434.*
[2] *2 B. & A. 882.*
[3] *(1873–74) 9 C. P. 208.*
[4] *(1913) 1 K. B. at p. 322.*