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Assistant Judge has found to be established, and we see no reason to interfere with his decision, which would seem to be just, as well as legal.

Decree affirmed.

Sept. 1.

Special Appeal No. 267 *of* 1868.

DA'DA'BHA'I NARSI.....*Appellant.*
SALLEMA'N DASSU .....*Respondent.*

Agreement for Sale of Goods—Place of Delivery.

In the absence of any agreement as to delivery, goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement for sale, or, if not then in existence, at the place at which they are to be produced.

Distinction between an ordinary contract for sale of goods and a contract to pay an existing debt in specific articles pointed out.

THIS was a Special Appeal from the decision of S. H. Phillpotts, Acting Senior Assistant Judge at Broach, in Appeal Suit No. 101 of 1867, confirming the decree of the Munsif of Jambúsar.

This suit was instituted by the plaintiff, Dádábhài Narsi, on an agreement dated 27th December 1865, whereby the defendant agreed to deliver to the plaintiff 2½ *bhár* of cotton on the 3rd of March 1866, or in default to forfeit Rs. 60 per *bhár*, and repay with interest the sum of Rs. 300 advanced on the agreement. He alleged that, the defendant having failed to fulfil his part of the contract, he was entitled to recover the principal sum of Rs. 300, together with damages and interest.

The defendant admitted the execution of the bond, but stated that on account of the depression in the price of cotton the plaintiff refused to receive it, though repeatedly asked to do so; that he had kept the cotton on the plaintiff's account, and always had been ready and willing to deliver it.

The Munsif, Jamiyatrám Himayatrám, rejected the plaintiff's claim, on the ground that the plaintiff had failed to take delivery of the cotton at the place where it was deliverable.

The issues raised on appeal were—(1) On whom does the *onus probandi* rest; (2) Has he on whom the *onus probandi* rests proved his point. On the first issue the Acting Senior Assistant Judge recorded the following finding:—

"The *onus probandi* rests on the plaintiff, for he does not seek to recover money paid alone, but also seeks to recover liquidated damages for breach of contract; so he must show he did what he was bound to do. The chief dispute between the parties is whether the uncleaned cotton should be delivered in Broach or in Chanchvel, which is eighteen miles from Broach; in Broach are the plaintiff's warehouse and residence, in Chanchvel are the defendant's fields and residence; and it was alleged by the respondent's *vakil*, and not denied by the appellant's, that this contract was made in Chanchvel. In this contract there is only written that 'I (*i.e.*, the defendant) will on Falgoon Vud 2 deliver uncleaned cotton'—where it is deliverable, is not written; the appellant urges that the meaning is that it was deliverable in Broach, and the respondent urges that the meaning is that it was deliverable in his own village; and my opinion is that the respondent is right: for if it was determined that the condition was delivery in Broach, then the Court would be introducing a new condition into the contract, which the parties did not make; and as the cotton was deliverable in Chanchvel, the plaintiff is of course obliged to show that he did go and ask for the cotton, for he seeks to recover damages for the defendant's non-delivery. So if he did not go to get the cotton, he has no right to sue, else he would be taking advantage of his own wrong; moreover I do not think that the cotton was deliverable in Broach, for if it had been, there would have been a stipulation to the effect that it was deliverable at his warehouse, or at a certain gin, of which there is no stipulation: so I am of opinion that the *onus probandi* is on the plaintiff."

The finding on the second issue was to the effect that the plaintiff had failed to prove that he had gone to the defendant's residence to take delivery of the cotton, and, therefore,

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he had not performed his part of the contract. The decree of the Munsif was, therefore, confirmed.

The plaintiff thereupon preferred a special appeal, on the ground that the lower court was wrong (1) in throwing the *onus probandi* upon the plaintiff, and (2) in rejecting the plaintiff's claim not only with respect to the damages, but also with respect to the amount advanced as the stipulated purchase-money for the cotton sold.

The appeal was heard before COUCH, C.J., and GIBBS, J.

Nánábhái Haridás for the appellant.

There was no appearance for the respondent.

COUCH, C.J.:—A contract of sale differs from a contract to pay an existing debt in specific articles, a distinction which does not seen to be noticed by Mr. Addison in his work on Contracts. In the latter "if the condition of a bond be to deliver twenty quarters of wheat or twenty loads of timber, the obligor is not bound to carry the same about and seek the obligee, but the obligor, before the day, must go to the obligee, and know where he will appoint to receive it, and there it must be delivered:" Addison on Contracts, 1042. But in the former "if no place be designated by the contract, the general rule is that the articles sold are to be delivered at the place where they are at the time of the sale" (2 Kent, Comm. 505). And "in a contract of sale, if no place of delivery be agreed upon, the goods must be delivered at the place where they are at the time of the sale, unless some other place be designated by usage.** But where goods are to be delivered in payment of a previous debt, and no place is specially appointed, or is to be inferred from the usage of trade, or the nature of the thing, it is the duty of the debtor, first, to request the creditor to appoint a place, whereupon the creditor must appoint a place which is reasonable; if he do not, the debtor himself may name a reasonable place, giving notice to his creditor, and a tender of the property at that place will be good. So, also, where the time of delivery is fixed, although the place is not, the same rule applies:" Story on Contracts, 881.

There does not appear to be any express decision of the English courts on a contract of sale, but there can be no doubt what would be if the point were directly raised.

The Senior Assistant Judge has decided that the place of abode of the seller is the place of delivery in this case, and, that being the place where the cotton was at the time of the sale, his decision is correct; and as it has been found as a matter of fact that the plaintiff did not go to the defendant's place to take delivery, and the plaintiff thus failed to perform his duty, the decree of the lower court must be confirmed with costs.

GIBBS J.:—I concur.

Decree confirmed.

Civil Petition.

Sept. 3.

VA'SUDEV VISHNU, a Minor, by his Guardian Bháskar Vásudev, *et al.* .....*Petitioners.*

NA'RA'YAN JAGANNA'TH DI'KSHI'T.....*Opponent.*

Arbitration Award—Execution—Appeal—Civ. Proc. Code, Sec. 327.

An appeal lies from an order made in execution of an arbitration award filed under the provisions of Sec. 327 of the Civ. Proc. Code.

ON the 28th of August 1867 an arbitration award was made whereby Náráyaṇ Díkshít obtained certain rights against the petitioner Vásudev, and, at the instance of Náráyaṇ, it was filed in the Court of the Principal Ṣadr Amín of Khándesh on the 25th of November 1867. After this an application for the execution of the award was presented by the said Náráyaṇ, and the Principal Ṣadr Amín ordered the award to be executed as prayed for. Upon this the petitioner Vásudev presented a petition of appeal to the Judge, the Honorable G. A. Hobart, who, under date the 2nd of March 1868, made the following order:—

"Without entering into the merits of the order appealed against, I refuse the appeal, because, though it is laid down in Sec. 327 of Act VIII. of 1859, that awards of the nature of that with reference to the execution of which the appeal is made, shall be enforced as awards made under the provi-