Special Appeal No. 61 *of* 1870.

1871. June 26.

DAYA'BHA'I DI'PCHAND .....*Appellant.*
DULLABHRA'M DAYA'RA'M .....*Respondent.*

Contract for Delivery of Shares—Assignment in Equity—Equities on Assignment of Contract—Readiness and Willingness to deliver—Tender—Actual Tender where dispensed with.

A contract for the delivery of shares at a future day is a contract that can be assigned in Equity, and the assignee of such a contract can, in his own name, maintain a suit to recover damages for its breach in the Civil Courts in India.

In such a suit the plaintiff would be subject to any equities that might subsist between his assignor and the defendant.

In order to support an allegation of readiness and willingness to deliver, an actual tender is not in all cases necessary: *e.g.*, a tender will be dispensed with where the defendant has refused to perform the contract, or where on the day for the performance of it he has absconded, and, having closed his place of business, has left no agent or other person to represent him.

THIS was a special appeal from the decision of the District Judge of Súrat, confirming the decree of the Ṣadr Amín of Súrat.

The plaintiff, Dayábhái, sued Dullabhrám in the Court of the Ṣadr Amín of Súrat for the recovery of Rs. 1,700, being damages sustained by the plaintiff, by reason of the defendants not taking delivery of twenty-five shares of the Broach Bank and Finance Corporation, Limited. Dayábhái alleged that Dullabhrám had agreed, under a writing dated 7th April 1865, to take delivery of the above shares from one Vrijbhukan Harjivan, and to pay him their price, on or before the 15th of July of the same year, but that he had failed to do so, and that the original vendor (Vrijbhukan) had assigned the contract to the plaintiff, who, therefore, instituted the suit.

The defendant pleaded, among other grounds, that the plaintiff had no right to sue him, as the agreement had not been made by him with the plaintiff; that the contract was a *saṭṭá* (time-bargain) contract; and that the shares were not delivered to him on the appointed day.

The Ṣadr Amín found that the plaintiff had a right to sue, and that the transaction was not a *saṭṭa* one. But he rejected

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the claim on the ground that the shares had not been tendered to the defendant on the day fixed for their delivery.

From this decision Dayábhái appealed to the District Judge of Súrat, who affirmed the decree of the lower court on grounds which will appear from the following extracts from his judgment:—

"The points for consideration are—1st, Whether the finding of the lower court, that the plaintiff had failed to prove the condition precedent to his right of action, was contrary to the weight of evidence; and 2ndly, Whether there was a right of action in the plaintiff.

"I find on both points in favour of the respondent.

"With regard to the first point, the appellant complains that the lower court found improperly upon the evidence that he had failed to prove his readiness to convey the twenty-five shares in question. I have, therefore, read over the whole of the depositions, and I am of opinion, not only that the Ṣadr Amín was right in his finding, but that, looking at the *modus operandi* in making the contract, and the manifest falsities in the statements of many of the witnesses, there was never any *bonâ fide* intention to convey and receive: in fact, the contract was simply what is termed a time-bargain; and the story of the purchase by Vrijbhukan of shares, portions of which have been produced here, is simply a scheme concocted to enable the person who won on the bargain to establish his claim in the Civil Courts. I consider that the finding of the lower court, as to the plaintiff's failure to prove his readiness to convey the shares in accordance with the terms of the contract, was fully warranted by the evidence. With regard to the second point, I can only repeat that in my mind it was not competent to the plaintiff to maintain this action, for the reason that the right residing in Vrijbhukan could not be made the subject of an assignment, either in law or equity. There was apparently no debt or anything substantial belonging to the transferor, but simply a right to legal remedies—in other words, but a mere naked right. I can find no authority in support of such an as-

signment, and it appears to me to be opposed to public policy.

"I affirm the decision of the lower court, with costs on the appellant."

Against this decision the plaintiff, Dayábhái, preferred a special appeal to the High Court, on the grounds that (I.) the District Judge was wrong in holding the transaction to be a time-bargain, contrary to the admission of the respondent, and without having framed any issue on that point; that (II.) the plaintiff's assignor (Vrijbhukan) having a certain interest vested in him to recover damages for breach of contract from the respondent, the Judge erred in holding that it was a mere naked right, and, as such, could not be made the subject of an assignment; that (III.) both the lower courts erroneously considered an actual tender of the shares necessary in the case.

The special appeal was argued before WESTROPP, C. J., and GIBBS, J.

Macpherson (with him *Chunilál Máṇiklál*), for the appellant:—The Judge held the transaction to be a time-bargain not only without any issue having been laid down by him on that point, but in direct violation of the respondent's admission in his deposition (exhibit No. 8) that he did intend to take the shares if they continued to be sold at a premium. As to the assignment of the shares to the plaintiff, Vrijbhukan had a valuable interest, which he was entitled to transfer according to the established principles of equity. [WESTROPP, C.J.:—It is clear that an interest in a contract can be transferred.] Both the lower courts erred in considering that the shares ought to have been actually tendered to the respondent on the day appointed. Vrijbhukan was found to have had in possession as owner a sufficient number of shares on that day, and to have shown his readiness and willingness to perform his part of the contract by giving the respondent a notice in writing on the 9th of July 1865, requesting him to take delivery of the shares. Under these circum-

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stances, an actual transfer was not necessary: *The Imperial Banking and Trading Co.* v. *Pránjivandás Harjivandás* (*a*).

Girdharlál Dayáldás, for the respondent:—The lower courts having found as a matter of fact that the plaintiff's assignor (Vrijibhukan) was not ready and willing to offer the shares, this court, sitting in special appeal, is bound by that finding. As for the assignment, the interest under the contract was uncertain, and could not, therefore, be assigned.

Cur. adv. vult.

WESTROPP, C.J.:—The defendant in his deposition (exhibit No. 8) admitted that his intention was to take delivery of the shares (the subject of the contract in the plaint mentioned) if they continued to be sold at a premium and not at a discount. The Ṣadr Amín laid down as the 3rd issue, whether the said contract was a *saṭṭá* or not—that is to say, whether the provisions of Act XXI. of 1848, which prohibit the maintenance of a suit upon agreements by way of wagering, applied or not. The Ṣadr Amín determined that issue in the negative, and in favour of the plaintiff. On the occasion of the appeal by the plaintiff to the District Judge, the defendant did not take any objection, under Sec. 348 of the Civil Procedure Code, to the finding of the Ṣadr Amín upon the said third issue, nor did the District Judge himself lay down any issue as to whether or not the said contract was one within Act XXI. of 1848. The District Judge, therefore, ought not, in and by his judgment in this cause, to have held that the said contract was a time-bargain, upon which the bringing of an action is prohibited by Act XXI. of 1848. The District Judge should also, on the assumption that the said contract is not an agreement by way of wagering or gaming, have held that in Equity it was assignable for a valuable consideration (Spence, Eq. Juris. 852), subject, no doubt (generally speaking), to the equities (if any) which may have existed between the defendant and the original vendor, Vrijbhukan Harjivan (*Ibid.* 863). For instance, if the defendant were entitled to a set-off against

(*a*) 2 Bom. H. C. Rep. 258.

Vrijbhukan Harjivan, if he had sued the defendant upon the contract, the defendant would in this action, brought by the assignee of the said Vrijbhukan Harjivan, be entitled to the same set-off against the plaintiff (the said assignee): Leake on Contracts, 604, 605; Story, Equity Juris. 1047; *Ryall* v. *Rowles* (*b*). Circumstances in the conduct of the vendee may have rendered an actual tender to him by the vendor (or his assignee) of the share-certificates and transfer deeds unnecessary. Whether this was so here, the re-trying court will have to consider. It is correctly stated in Leake on Contracts, page 464, that "a refusal to perform the contract by one party, so long as it remains unretracted, discharges the other party from the performance of all acts which he would otherwise be bound by the contract to perform, and so may operate as an excuse for the non-performance of conditions precedent." In *Ripley* v. *MacClure* (*c*) the plaintiff contracted with the defendant for the sale of a cargo of tea, to be delivered on arrival of the ship, to the defendant at a certain price payable after delivery. Before the arrival of the cargo the defendant repudiated the contract and refused to perform it, and it was held that the refusal, not having been retracted, discharged the plaintiff from a delivery of the tea upon its arrival, and rendered the defendant liable for a breach of contract in not accepting the tea without such delivery. In the unreported case of *The Imperial Banking & Trading Co.* v. *Thákarsi Punjáshá and three others*—which was an action for the non-acceptance of three Back Bay shares (and decided on the 23rd of June instant), the vendors had, some time previously to the 1st of July 1865 (the day named in the contracts for the delivery of the shares and payment of the purchase-money), given notice to the purchasers (the defendants), through their agent, to be ready to take delivery on that day and pay the purchase-money, but discovered, when that day came, that the usual place of business of the defendant in Bombay was closed, and that their agent, who had effected the contract on their behalf, and conducted their other business in Bombay for the defendants

(*b*) 2 Wh. & Tu. L. C., 670-736, 3rd ed. (*c*) 4 Exch. 345.

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(who themselves resided at Ahmedábád), had disappeared—it was held at the Original Jurisdiction side of this court that the plaintiffs were not bound to make an actual tender to the defendants or their agent of the share-certificates and transfer-deeds, and that it was sufficient evidence of the readiness and willingness of the plaintiffs to perform their part of the contract to show that on the 1st of July 1865 they had the share-certificates ready for delivery, and also the transfer-deeds ready for execution in favour of the defendants, by the registered owner of the shares, who was then willing to execute those deeds.

This court reverses the decrees of the courts below, and remands the case for re-trial by the Acting District Judge on the merits. On such re-trial he should lay down and determine the following, and such other (if any) issues as the circumstances of the case may require:—

(I.) Whether the contract in the plaint mentioned was duly assigned for valuable consideration to the plaintiff by Vrijbhukan Harjivan previously to the filing of the plaint in his suit.

(II.) If the Acting District Judge shall determine the first issue in the affirmative, let him ascertain whether the plaintiff was ready and willing to deliver the shares, the subject of this suit, in accordance with the terms of the contract.

The District Judge is to be at liberty to permit the parties to give such fresh evidence, oral and documentary, as the above issues and the nature of the case may require, and will make such decree in accordance with his findings on the issues, and such award of costs of this suit (other than the costs of this appeal), as law and justice may require. It may be useful to refer him to the following authorities for his guidance, so far as the points decided in them may bear upon the present case:—*The Imperial Banking and Trading Co.* v. *Prânjivandás Harjivandás* (*d*), *per Couch*, J., as to readiness and willingness; *Maganbhái Hemchand* v. *Manchhabhái Kalliánchand* (*e*), *per Couch*, C.J.; *Parbhudás Prânjivandás* v.

(*d*) 2 Bom. H. C. Rep. 258, *et ibid.* 265, 266.
(*e*) 3 Bom. H. C. Rep., O. C. J. 79; *et ibid.* 85, 86.

Rámlál Bhágirath (*f*); *The Imperial Banking and Trading Co.* v. *A'tmárám Mádhavji* (*g*), *per Sausse*, C.J.; and Special Appeal No. 117 of 1870 (from Súrat), in which Dayábhái Dípchand, the present plaintiff, was the plaintiff, and Máṇiklál Vrijbhukan* was the defendant, a copy of the judgment in which must have been transmitted to the Súrat Adálat in February or March 1871.

Each party to bear his own costs of this appeal.

Special Appeal No. 124 *of* 1871. July 19.

SA'VJI bin SATU .....*Appellant.*
PATLU and MAHA'DU bin DHA'RU .....*Respondents.*

Claim on a Bond—Alleged Theft of Bond by Obligees—Plea of Payment—Burden of Proof.

The plaintiff sued on a bond made in his favour by the defendants which he alleged had been stolen by the defendants. The defendants, while admitting the execution of the bond, pleaded payment and that the bond had been returned by the plaintiff to them. They did not produce the bond, nor did they offer any evidence of the alleged payment.

Held that, as the defendants admitted the bond and pleaded payment, the burden of proof of such payment lay on them.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátárá, in Regular Appeal No. 155 of 1870, reversing the decree of the Subordinate Judge of Tásgám.

The facts of the case sufficiently appear from the following judgment of the District Judge:—

"The plaintiff's claim was on a bond, dated Ashvin Shudh 1787, for Rs. 300, executed to the plaintiff by the defendants; no limit specified. Some land, 22 acres and 15 guntás, was in the possession of the defendants, and one-fourth "*vátá*" of the produce of this was promised in lieu of interest, or one-half this land to be placed in possession of the plaintiff. The *vátá* promised was given up to 1788, and then stopped, and the defendants stole the bond, and the plaintiff sued for

(*f*) *Ibid.*, O. C. J. 69, 78. (*g*) 2 *Ibid.*, 246, 248, 249.

* *Suprà*, p. 123.