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In re
BHAVAN
BADHAR.

assessment in respect of the said land is to be paid by me; you are to be paid Rs. 131 clear on account of the said rent. I am to clear the said land and make it over to you on the 19th of April, 1882, without your asking for it and without objection."

Nanabhai Haridas, Government Pleader, for the Commissioner, N. D.

There was no appearance by any of the executing parties.

Per Curiam.—We think that the language of clause (b), article 13, of Schedule II of Act I of 1879, exempts all leases executed in the case of a cultivator without the payment or delivery of any fine or premium, whatever the reserved or annual rent may be, provided it be for a definite term not exceeding one year, and also whatever the term may be, provided the annual rent reserved does not exceed Rs. 100.

ORIGINAL CIVIL.

Before Mr. Justice Latham.

May 4, 5 and 6.

RUTTONSEY MORARJI AND OTHERS, PLAINTIFFS, *v.* JAMNADAS
PITAMBERDAS, DEFENDANT.*

Contract—Suit for damages for non-acceptance—Dispute as to quality of goods tendered—Right to examine goods—Survey—Reasonable time for examination of goods by purchaser—Contract Act (IX of 1872), Section 38.

The defendant agreed to purchase from the plaintiffs one hundred full-pressed bales "fully good fair Kishli cotton" at Rs. 208-8 per candy, to be delivered from March 15th to April 1. On March 21 the plaintiffs sent the defendant a letter reminding him of the contract and requesting him to take delivery. On receipt of this letter the defendant put the matter into the hands of V. The plaintiff had then no cotton of the specific kind to deliver, nor did the letter refer to any particular bales. At 11-30 o'clock A.M. on March 30th the plaintiffs sent the defendants a letter enclosing a sampling order directed to an employe of Messrs. H. and S., on whose premises the bales referred to in the order were lying. V., on behalf of the defendant, got samples taken of the cotton and examined them, but without reference on that day to any standard. He then, however, conceived doubts as to the quality of the cotton and expressed his doubts to the plaintiff in the evening of that day. On March 31 the plaintiffs sent the defendant a delivery order enclosed in a letter from their solicitors calling on the defendant to attend with his surveyor at 1 P. M. on that day to survey the cotton, as otherwise an *ex-parte*

* Suit No. 288 of 1881.

survey would be held. This letter reached the defendant at 11-30 o'clock A.M. and was given by him to V. at noon of the same day. V. applied to M. to attend as surveyor, but M. was unable to do so. The plaintiffs had an *ex-parte* survey held by Messrs. C. & B. at 1 P.M. and they pronounced the cotton, samples of which were submitted to them, to be "fully good fair Kishli cotton". While this survey was going on, the defendant was on the Cotton Green, but declined to attend, saying that V and his surveyor were coming. Shortly afterwards V. did come, and subsequently wrote a letter to plaintiffs in the defendant's name, stating that the cotton was not of the description contracted to be sold by them, and asking for a survey. This letter reached the plaintiffs at 2-19 o'clock P.M. After this there was a discussion between plaintiffs and defendant and V. On that afternoon (the 31st March) the plaintiffs' solicitors sent a letter to the defendant stating the result of the survey and requiring him to take delivery. This was answered by a letter of next day (April 1) from the defendant's solicitors denying that the cotton was of proper quality or that proper notice of the survey had been given, alleging that the defendant had that morning attended with his surveyor and asked leave to survey the cotton which had been refused, and stating that the contract must be treated as cancelled. The cotton was sold by auction on April 5th. The plaintiff brought this suit to recover Rs. 1,631-1-11 as damages for non-acceptance of the cotton. The defendants contended that there had been no reasonable time allowed by the plaintiffs for the examination of the cotton and that a joint survey should have been held.

Held, that a joint survey was not necessary under the terms of section 38 of the Indian Contract Act (IX of 1872) and that the defendant having had a period of twenty-four hours for inspection, had had a reasonable opportunity of seeing whether the cotton offered by the plaintiffs was such cotton as the plaintiffs were bound by their contract to deliver.

A purchaser of goods is not entitled to continue inspecting and examining the goods offered by the vendor until the expiration of the period for delivery. A reasonable opportunity for such inspection and examination is all that he is entitled to.

Suit to recover Rs. 1,631-1-11 as damages for non-acceptance of goods purchased.

The plaintiff alleged that by a written agreement in Gujarati language, dated the 28th January, 1881, the defendant agreed to purchase from plaintiffs "one hundred full-pressed bales fully good fair Kishli cotton at the rate of Rs. 208-8 per candy" through a broker named Callianji Ludha. Delivery was to be taken from 15th March, 1881, to 1st April, 1881. On 21st March, 1881, plaintiffs sent a letter of that date to defendant, requesting them to take delivery of the cotton. On 30th March, 1881, the plaintiffs sent a sampling order to the defendant; and on 31st March, 1881, the plaintiffs through their solicitors tendered a delivery order to the defendant, who, however, refused to accept it.

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On 5th April, 1881, the plaintiffs sold the cotton by public auction on account of the defendant, and realized by the sale Rs. 8,460-12-1. The plaintiffs claimed the sum of Rs. 1,631-11-1 as damages sustained by reason of the defendant's breach of contract.

The defendant admitted the agreement, but alleged that the cotton offered to him by the plaintiffs was not of the quality stipulated for in the agreement. He also pleaded that the plaintiffs did not allow him a reasonable time for holding a survey on the cotton offered to him by the plaintiffs. He alleged that he was always ready and willing to perform his part of the contract of 28th January, 1881.

At the hearing the following issues were raised :—

(1) Whether the plaintiffs were ready and willing to perform their part of the contract of 28th January, 1881 ?

(2) Whether plaintiffs tendered to the defendant cotton of the quality in the said contract agreed to be delivered ?

(3) If such tender was made, whether the defendant was allowed by the plaintiffs a reasonable time for the examination of such cotton ?

(4) Whether defendant was justified in not accepting the said cotton ?

Starling and Lang for the plaintiffs.

Jardine and Telang for the defendant.

The material facts as proved in evidence are stated in the judgment.

June 13. LATHAM, J.—This is a suit to recover damages for the breach, by the defendant, of a contract to purchase cotton from plaintiffs. The contract is dated the 28th of January, 1881, and is for the sale of 100 pressed bales of the new Kishli “fully good fair” cotton at Rs. 208½ per candy; the time of delivery to be from March 15th to April 31st, 1881. On March 21, the plaintiffs sent the defendant a letter, reminding him of the contract, and requesting him to take delivery. The plaintiffs had then no cotton of the specific kind to deliver, nor does the letter refer to any particular bales, and I look on it merely as a reminder. On the receipt of this letter the defendant appears

to have put the matter into the hands of his friend Vizbhookandas Atmaram, partner in the firm of Narrondas Rajaram, cotton merchants, and broker to and at present in charge of the business of the firm of Messrs. Bushby & Co. On March 30th the plaintiffs sent the defendant a letter enclosing a sampling order directed to one Jairam, apparently an employe of Messrs. Harvey and Sabapathy on whose premises the bales referred to in the order were lying. This letter was received by Vizbhookandas Atmaram at 11-30 A.M. that day, as appears by his own endorsement. Vizbhookandas Atmaram got samples taken of the cotton in question by his mukadam Ludha Mohanji, and examined them, but without reference on that day to any standard. He, however, conceived doubts as to the quality and classification of the cotton, and expressed these doubts to the plaintiff Ruttonsey Morarji in the evening. Ruttonsey attributes this expression of opinion to the defendant, but is, no doubt, mistaken; indeed, he is a very inaccurate witness, and on his evidence I place little reliance.

On the next morning (March 31) the plaintiffs sent to the defendant a delivery order for the 100 bales enclosed in a letter from their solicitors, Messrs. Jefferson, Bhaishankar and Dinsha, calling on the defendant to attend with his surveyor at 1 P. M. to survey the cotton, as otherwise an *ex-parte* survey would be held. This letter at first sight appears peculiar, but is no doubt to be accounted for by Vizbhookandas Atmaram's intimation on the previous evening. It reached the defendant's hands at 11-30 A.M., and was given by him to Vizbhookandas Atmaram at noon. Vizbhookandas Atmaram applied to Mr. Marshall to attend as surveyor, but that gentleman did not do so, it being mail day. The plaintiffs had an *ex-parte* survey held by Messrs. Cheetham & Booth at 1 P. M., and they pronounced the cotton, samples of which were submitted to them, to be "fully good fair Kishli cotton", as appears by their certificate. While this survey was going on, the defendant was on the Cotton Green, but declined to attend, saying that Vizbhookandas Atmaram and his surveyor were coming. Shortly afterwards Vizbhookandas Atmaram did come, and he subsequently wrote a letter to plaintiffs in defendant's name (Exhibit D), stating that the cotton was not of the description and quality ordered by them (apparently mean-

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ing *contracted to be sold*), and asking for a survey. This letter reached the plaintiffs at 2-19 P. M.

After this there was a discussion between the plaintiff Ruttonsey and the defendant Vizbhookandas Atmaram to which I need not at present refer in detail. The plaintiffs' solicitors on that afternoon sent a further letter to defendant (Exhibit E), stating the result of the survey at which they erroneously alleged the defendant to have been present, and requiring him to take delivery. This was answered by a letter of the next day (April 1st) from the defendant's solicitors, Messrs. Smith and Frere (Exhibit G) denying that the cotton was of proper quality or proper notice of the survey given, alleging that the defendant had that morning attended with his surveyor and asked leave to survey the cotton, which had been refused, and stating that the contract must be treated as cancelled. After that the parties were at arm's length. The cotton was advertised for sale and in part sold by Messrs. Crawford & Co. on April 5, and no objection has been taken to the conduct of that sale or to Messrs. Crawford & Co.'s account thereof. On the morning of April 5, however, a letter was sent by Messrs. Smith & Frere to the plaintiffs, offering to take the cotton if the plaintiffs could satisfy the defendant and his surveyor that it was fully good Kishli cotton; but no tender of the price was made, nor did any surveyor attend.

On this state of facts the three material issues raised are—

- (1) Whether the plaintiffs were ready and willing to perform their part of the contract?
- (2) Whether plaintiffs tendered to defendant cotton of the quality agreed? and, if so,
- (3) Whether the defendant was allowed by plaintiffs a reasonable time for the examination of such cotton?

Before considering these issues I may mention that the price of Kishli cotton fell from Rs. 20 to 30 in the interval between the contract and date of delivery. Mr. Telang very properly admitted that this circumstance raised a presumption that his client would wish to get out of the contract. Still it is far from conclusive. However the plaintiffs might desire to perform their part of the contract, they might be unable to do so if no

cotton of the quality contracted to be sold was then in the market. At the same time the presumption should be attended to in estimating the conduct of the parties.

The first issue, literally interpreted, is very wide in its scope, so much so as to comprise the second; but I take the intention of counsel to have been that the point raised by the second issue should be considered as distinct from the first, the question to be decided under which is whether the plaintiffs were in a position to deliver to the defendant the 100 bales in question. It is true that the contract for these bales (Exhibit I), which were bought by the plaintiffs from Harvey and Sabapathy, bears date March 31; but the plaintiff Ruttonsey and the broker Ludha Pithraj depose to the arrangement having been made on the previous day, and the whole evidence in the case shows that the plaintiffs had then the bales under their control so as to be able to deliver them to the defendant. This is all that was requisite, and it is a matter of indifference whether the plaintiffs' legal title was complete at the time of their letters calling on defendant to sample and take delivery. I have no hesitation in finding the first issue in favour of the plaintiffs.

The second issue is of vital importance; and the plaintiffs have, by attempting to snatch an advantage over defendant by holding a survey in his absence, placed themselves in a serious difficulty. They have reduced the effect of that survey from being, as it might have been, a *quasi* arbitration almost if not altogether binding on the parties as to the quality and description, of the cotton, to the opinion of two experts on the quality and description of certain samples of cotton submitted to them. We must, therefore, trace the history of this cotton. [His Lordship reviewed the evidence and found the second issue in favour of the plaintiffs.]

The third issue raises the nicest question in the case. Mr. Telang relies on the 38th section of the Contract Act, and he contends that the reasonable opportunity there mentioned includes a joint survey. No doubt a joint survey would be a reasonable opportunity; but I should be introducing a new clause into the Contract Act if I were to hold a joint survey necessary to constitute the reasonable opportunity. There seems to be something like

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a mercantile custom about surveys springing up in connection with what are called the Association Rules, but it is admitted that these rules do not apply to the present case; and the varying opinions given as to what is reasonable notice of a survey show that no defined custom is yet in existence.

The rule in the 38th section of the Contract Act agrees with the rule of English law laid down in Benjamin on Sales (2nd ed., pp. 573 and 576); but there is little authority as to what is a reasonable opportunity of inspection. The point was considered at considerable detail in *Startup v. Macdonald* (1), where the Exchequer Chambers (*diss.* Lord Denman) reversing the Court of Common Pleas held that the tender of 10 tons of linseed oil at 8-30 P.M. on the last day fixed for delivery was a good tender; a decision which the Court appears to have felt bound to come to on the finding of the jury, though contrary to their own view of the facts. The rule of law is laid down by Williams, J., at page 619 of the report, and Parke, B., at p. 623. In the present case the sampling order was delivered to the defendant by 11-30 A.M. on the 30th March, and he had till 1 P.M. on the 31st March before any refusal by the plaintiffs to allow a further examination is alleged. Now, Vizhookandas Atmaram seems to have been certainly dilatory in his examination, he not having compared the samples with the standards till past noon on the 31st; and it seems to me that a period of over twenty-four hours gave a reasonable opportunity to see whether the cotton offered was the cotton which the plaintiffs were bound by their contract to deliver.

Then are we to go further, and to say that the purchaser is entitled to continue inspecting and examining until the expiration of the period for delivery? I find no authority for this, and in many cases it would be unreasonable to place to limit on the inspection. Is a purchaser at liberty to open and taste every bottle of wine in a lot sold; or, in the present case, to pass every pound of cotton through an expert's hands? There must be some limit; and I think that reasonable opportunity is the limit alike for

(1) G. M. & G. 593.

vendor and purchaser, and that such a reasonable opportunity had been had by 1 P.M. on the 31st March.

Further, I may say that I am not satisfied that there was an application on the 31st March for further inspection. The letter (Exhibit D) states positively that the cotton is not of the proper description and quality; and asks for a joint survey, not for further inspection, a survey which, according to defendant's contention, would not be due till the next day, *i.e.* till after the time for delivery had expired. Letter G of April 1 alleges no application before that day. The oral testimony is, as usual, conflicting; but the highest to which Vizbhookandas Atmaram carries it is that "he asked to be allowed to draw *fresh samples for his satisfaction*". In the face of the letters and the plaintiff Ruttonsey's denial I cannot think any application for a further inspection proved. For the reasons above given, I should hold that the plaintiffs were not then bound to comply with such an application, unless the defendant had given some reason for regarding the inspection already offered as insufficient. This is not done even here; and I may observe that I can see no reason why Vizbhookandas Atmaram should not have submitted the samples already in his possession to Mr. Marshall or some other expert: his not having done so is of importance both on this and on the preceding issue. I may observe that a great deal of the difficulty on this point arises from the ambiguous sense of the word "reasonable", which may either denote a legal limit, though one to be fixed on consideration of the circumstances of the case, in which sense it is used in section 38 of the Contract Act; or may be used in contradistinction to "legal", as when we say "it is not reasonable for a man to exist on his strict legal rights". In my opinion Mr. Booth used the word in the latter sense when he said "it would not be reasonable to refuse a buyer a survey up to the last moment for taking delivery", by which expression I think he meant the same as Mr. Marshall meant when he said "if either party turned up within the time fixed by the contract, we should re-open the matter as a matter of courtesy."

I find issues 1, 2, 3, and 4 for the plaintiffs. As to issue 5, concerning the amount of damages, I of course disallow the Rs. 20

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for surveyor's fee and the Rs.16-8 for solicitors' notices mentioned in the particulars of demand. I also disallow Rs. 39-1-3 for interest claimed in these particulars, and do not give interest since the filing of the plaint, as I think that the plaintiffs' hasty conduct has greatly conduced to this litigation, and I, therefore, am not disposed to give them interest by way of damages. Deducting Rs. 73-9-3, the total of these disallowed items, from the Rs. 1,631-11-1 claimed in the plaint, I pass a decree for the plaintiffs for Rs. 1,559-1-10 and costs.

Attorney for plaintiffs.—Mr. *R. M. Sayani*.

Attorneys for defendant.—Messrs. *Shapurji and Thakurdas*.

ORIGINAL CIVIL.

Before Mr. Justice Latham.

LUKMIDAS KHIMJI AND OTHERS, PLAINTIFFS, v. PURSHOTAM
 HARIDAS, OODHOWJI WALLJI AND GOCULDAS JEWRAZ,
 DEFENDANTS. *

September 27.

Partnership—Parties—Practice—Contract Act (IX of 1872), Section 43.

In a suit brought upon a contract made by a firm the plaintiff may select as defendants those partners of the firm against whom he wishes to proceed, allowing his right of suit against those whom he does not make defendants to be barred.

In this suit the plaintiffs sued to recover from the defendants the sum of Rs. 16,424, the price of goods sold and delivered.

Written statements were filed by the first and third defendants. The first defendant denied that he was a partner with the second and third defendants. The third defendant also denied that the first defendant had ever been a partner in his firm, which consisted of three partners, viz., himself, the second defendant and one Hemraj Haridas. He submitted that the said Hemraj Haridas ought to be made a party to this suit.

Upon the issues being framed at the hearing, counsel for the defendants raised the point as to whether the alleged partner, Hemraj Haridas was not a necessary party to the suit.

Starling (with the Hon. *B. Lang*, Acting Advocate General) contended that, under section 43 of the Indian Contract Act (IX of 1872), a plaintiff might sue as he pleased any or all of the partners

* Suit, No. 216 of 1880.