ORIGINAL CIVIL.

Before Mr. Justice Beaman.

MUKUNCHAND RAJARAM BALIA (PLAINTIFF) *v.* NIHALCHAND GURMUKHRAI (DEFENDANT).* 1915. *July* 2.

The Indian Contract Act (IX of 1872), section 47—Sale and purchase of cotton goods—Forward contract, March delivery—Contract not to be cancelled on any account—Contract governed by the Rules of the Bombay Cotton Trade Association—Rule 17 of the Bombay Cotton Trade Association—Vendor bound to tender goods without demand from the purchaser—Railway receipt not a delivery order—Vendor committing a breach cannot sue in damages—Vendor not mulcted in costs, breach being technical.

By a contract dated the 25th January 1914, the defendant agreed to purchase from the plaintiff 200 bales of cotton—March delivery, between the 15th and the 25th. The contract was expressed to be, in all details, governed by the Rules of the Bombay Cotton Trade Association, subject to the exception that it was not to be cancelled on any account. Under Rule 17 of the Rules of the Bombay Cotton Trade Association, the vendor was bound to tender a delivery order backed by the goods before 1 P. M. of due date. In the event of his failure to do so, the buyer had three courses open to him: (1) to cancel the contract; (2) to buy at seller's risk; and (3) to close at the room-rate of the day. On the 19th March 1914, the plaintiff handed over to the defendant a railway receipt for 100 bales. On the 25th March 1914, the defendant applied to the railway authorities for delivery of the goods, and failing to get the same, returned the railway receipt the next day to the plaintiff informing him that by reason of non-performance on the plaintiff's part, the contract had been cancelled by the defendant. The plaintiff, relying upon the clause of the contract precluding either party from cancelling the same in any event, claimed the sum of Rs. 2,279-13-0, the difference between the contract price and the market price in respect of 100 bales. The plaintiff further contended that giving a railway receipt was tantamount to giving possession of the goods, and that inasmuch as the defendant had accepted the railway receipt and did not notify the plaintiff that the goods had not come to hand before due date, he was estopped from pleading that the plaintiff had not made a sufficient tender under Rule 17 of the Bombay Cotton Trade Association.

Held, (1) that it was the plaintiff's duty to satisfy himself that the goods covered by the receipt had actually arrived before due date, and that if he failed

* O. C. J. Suit No. 1251 of 1914.

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to do so, he would not be absolved from the obligation of tendering the delivery-order backed by the goods according to the contract.

(2) the plaintiff having shown himself to be in the breach, could not approach the Court and sue for damages on the contract.

Vanmali Hargovind v. *Tarachand Ganeshamdas* [1], referred to.

THE plaintiff and the defendant were shroffs, merchants and commission agents, doing business in Bombay. By a contract in writing dated the 25th January 1914, the plaintiff sold to the defendant 200 bales of Bengal Fully Good Cotton deliverable from the 15th to the 25th of March 1914 at the rate of Rs. 223-4-0 per candy. The contract provided that the same was not to be cancelled on account of any cause and that it was made according to the rules and regulations of the Bombay Cotton Trade Association.

The contract of purchase ran as follows :—

To wit:—We have bought from you 200 fully pressed bales (*i.e.*, two hundred) Bengal Fully good new crop of Samvat 1970. The rate thereof is Rs. 223-4-0, in figures two hundred and twenty three four annas, per candy. Rebate at 5½ per cent. to be allowed. The time for delivery is from 15th March to 25th March 1914. The contract cannot be cancelled on account of any cause. (The contract is made) according to the rules and regulations of Bombay Cotton (Trade) Association. We would take delivery on condition of the 100 bales measuring 26 tons.

Brokerage ½ per cent. to be paid by the vendor.

Rule 17 of the Bombay Cotton Trade Association *inter alia* provided as follows :—

"All cotton contracted for, for forward delivery, shall be ready and delivery order for the same (as provided in Rule 15) shall be tendered by 1 P. M. (standard time) on the latest day for delivery specified in the contract. In case a delivery order for the cotton or any portion of it, is not so tendered, or in case the cotton or any portion of it for which a delivery order has been passed, is not actually then ready in Colaba or Jaitha, or in the godown for delivery, the buyer may (1) cancel the contract, or (2) buy in the market on the same day at a reasonable rate on account, and at the risk and expense of the seller, or (3) claim damages at the market rate of the day, vide Rule 29 ;

[1] (1891) Chitty and Patell, collection of cases of the Bombay Small Causes Court, p. 305.

provided always that in the event of the buyer exercising the option of buying in the market and there being any dispute as to the reasonableness or otherwise of the price paid by him such dispute shall be referred to arbitration as provided by Rule 13. If on the other hand the seller has tendered the cotton within the time specified in the contract as provided for above, and if the buyer neglects or refuses to either approve of, or have arbitration held on the cotton so tendered as provided in Rule 18 hereafter the seller after giving 48 hours' notice to weigh after the expiration of the time allowed by arbitration, has the option of either selling the goods at the risk and expense of buyer, or claiming damages at the market rate of the day."

On the 19th of March 1914 the plaintiff handed over to the defendant a railway receipt in respect of 100 bales of cotton consigned from up-country. On and prior to the 25th of March 1914 the defendant applied to the railway authorities for the delivery of the bales, and the defendant not getting the same instructed his attorneys to write on the 26th March 1914 as follows :—

"Our client says that he applied for delivery to the railway authorities yesterday, but he was not able to obtain delivery thereof. We are therefore instructed to return you the said railway receipt, and to inform you, that by reason of the non-performance on your part of the contract, the same has been cancelled by our client."

The plaintiff's attorneys sent the following reply, on the same day :—

"Our client tendered to yours the railway receipt in respect of the contract mentioned in your letter, and that your client is not entitled to cancel the contract. Your client is aware that the contract contains a term that the same is not to be cancelled under any circumstances. Your client cannot therefore cancel the contract. Our client closes the said contract at the rate declared by the Bombay Cotton Trade Association yesterday, and will send in their bill in due course. Without prejudice however to the above, our client states that if your client had informed ours as soon he applied for delivery and was unable to obtain the same, our client would have at once delivered the bales to your client at the Colaba Cotton Green."

The defendant's attorneys replied on the 28th of March as follows :—

"Our client denies your client's alleged right to close the contract after receipt of our letter cancelling the same. Our client's duty was to wait for

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delivery till the last month. Your clients chose to tender railway receipt in performance of the contract and the goods were not delivered and there remained no further obligations upon our client as attempted to be fastened by your letter under reply. Our client denies his liability to pay difference according to the alleged closing."

The plaintiff thereupon sued to recover the sum of Rs. 2,279-13-0, being the difference between the contract price and the market price for 100 bales, alleging that the defendant was not entitled to cancel the contract and that the plaintiff was justified according to the rules of the Bombay Cotton Trade Association, in closing the same at the rate declared on the 25th of March 1914. The plaintiff further alleged that giving a railway receipt was tantamount to giving possession of the goods, and that inasmuch as the defendant had accepted the railway receipt and did not notify the plaintiff that the goods had not come to hand before due date he was estopped from pleading that the plaintiff had not made a sufficient tender under Rule 17.

The defendant denied that the railway receipt was handed over in part performance of the contract or that he thereby waived his right to require a delivery order or delivery of actual goods as provided by the rules of the Bombay Cotton Trade Association. The defendant said that the railway receipts are usually handed over for the sake of convenience of the vendors, and that if the goods do not arrive before the due date the receipts are invariably returned to the vendors. The defendant contended that under the circumstances aforesaid he was entitled to cancel the said contract.

The contract as to the remaining 100 bales of cotton was settled between the parties before the due date, by the defendant paying Rs. 2,279-13-0 to the plaintiff.

Wadia and *Mehta* for the plaintiff.

Setalvad and *Desai* for the defendant.

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BEAMAN, J. :—This case has been brought, as counsel stated, by way of a test case. The point upon which I understood, at first, that it was meant to be a test case was, whether the contract between the parties was to be read as containing a clause precluding either of them from cancelling the contract in any event, and, if so, whether that was a good agreement. As the case developed it appeared as though the decision of the Court were required upon another point, namely, whether the plaintiff by giving the railway receipt on the 19th of March 1914 had thereby complied with the condition of the contract made between the parties requiring tender by the vendor. The contract is a cotton contract entered into on the 25th of January 1914 for the purchase by the defendant from the plaintiff of 200 bales of cotton—March delivery—between the 15th and 25th, and expressed to be, in all details, governed by the Rules of the Bombay Cotton Trade Association, subject only to this exception that in no circumstances was the contract to be cancelled. I have no doubt whatever, notwithstanding the fact that for want of punctuation a different construction has been sought to be placed by the defendant upon the term, that the contract was meant and was expressed to be irrevocable. A very cursory study of the Rules of the Bombay Cotton Trade Association will show why a term of this sort is introduced into almost all cotton contracts between reputable dealers. If we turn to Rule 17 of the Rules of the Bombay Cotton Trade Association, we shall find that under a contract of this kind the vendor is bound to tender a delivery order backed by the goods before 1 P. M. of due date. That will be on this occasion before 1 P. M. of the 25th of March 1914. In the event of his failure to do so, the buyer has three courses open to him : (1) to cancel the contract ; (2) to buy at seller's risk ; and (3) to close at the room-rate of the day. The first of these three courses,

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if left open, would practically put a stop to all cotton business in Bombay. That is the reason why all these contracts will be found, I believe, certainly the English contracts, to have a clause similar to the clause in this contract stipulating that in no circumstances is the contract to be cancelled. What, then, is the result if the seller does not tender a delivery order for the goods in due course? The buyer may buy at seller's risk paying the difference if the market has fallen, or he may choose simply to close the contract without taking the goods by paying differences. If the seller refuses or negligently omits to tender, it is obvious that in a falling market the buyer stands in no need of any remedy whatever. The provisions of Rule 17, which have the appearance of being optional, must, therefore, be understood, if business is to go on at all, as being imperative upon the other party to the contract. Very unfortunately, expert evidence which might have been available to the Court on the custom of the trade, particularly with reference to the substitution of railway receipts for delivery orders, was objected to by the defendant; and consequently I have not that material on the record which would enable me to give chapter and verse upon the highest authority for the proposition I am now stating as being a proposition generally true, applicable to, and governing the cotton trade in this city. There can, I apprehend, be absolutely no doubt that between large firms thousands of deals are entered into under the Rules of the Bombay Cotton Trade Association, every contract including a term that the contract shall not be cancelled in any circumstances; and that the parties thereto settle under Rule 17 in the manner I have described; that is to say, it would be the understanding between honest dealers that the party against whom the market had turned would, whether delivery were tendered or not, conclude the contract in the manner made optional to him by

Rule 17. He could not cancel the contract but he would be obliged, if he were an honest dealer, either to buy at the risk of his vendor and send him a difference note, stating the rates at which he bought and at which he had agreed to buy from the vendor, and pay the difference; or he would adopt the simpler course of merely invoicing the goods back to the vendor at the market rate of the day, again paying the difference. It is perfectly clear that if the contracts were allowed to be cancelled merely for non-tender of goods or delivery order, as is actually provided for in Rule 17, a great part of the cotton business done on a large scale by the principal firms here would be paralysed. On the other hand, it is equally clear that the insertion of such a clause in the contracts indicates that they are essentially what the Courts would call wagering contracts, and, therefore, there might be some difficulty in enforcing them in a Court of law. Doubtless, it is also for this reason that so little stress is laid upon the tender of the delivery order; for the non-tender of the delivery order, for all the purposes which the framers of the Rules had in view, could make no substantial difference to the losses or gains of the parties, once they had contracted themselves out of the liberty allowed to the party not in breach to cancel the contract. So that I do not doubt that in practice very little importance is attached to the actual tender of delivery orders or of goods where the contracts have been made rather for cover than with the object of actually obtaining goods, it being then the well-understood practice of the market that the loser on such contracts will follow out the intentions of the framers of the Rules, whether delivery was tendered or not, by adopting one or other of the two courses laid down in Rule 17. The third course, viz., the cancellation of the contract, must, I repeat, be kept out of view altogether.

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Now, in a case like the present, the defendant is "bulling" the market, and accordingly on the settling day, the fall having been very heavy, stands to lose a considerable sum to the plaintiff. The plaintiff has goods in his possession and nothing could have been easier for him than to tender a delivery order backed by goods to the buyer. And what was puzzling me throughout the earlier part of the case was how a business man could be so utterly foolish as to neglect a natural precaution of that kind, which would have protected him against all the legal difficulties that have proved so insurmountable here. It was only when I came to read Rule 17 much more carefully that I realised that between honest dealers the tender or non-tender of delivery really made no difference whatever. If the other party to the contract, whether delivery was tendered or not, is equally bound, as though upon a breach, to carry out the contract in one of the two ways I have mentioned and is prohibited from cancelling it, it becomes at once clear that nothing really turns upon the tender. Let us suppose that the buyer in a falling market really desired to get the goods he had bought. He cannot seriously pretend that he is damnified in any way by the plaintiff not tendering. All he has to do is to buy the goods in the market where he would get them at a much lower rate than that he was to pay the plaintiff. It is obviously, therefore, fallacious and hypocritical on the part of the defendant here to pretend that there has been a substantial breach of the contract on the plaintiff's part. Technically, no doubt, there has been, and that is the plaintiff's great misfortune. As the defendant had settled honestly in respect of half of the contract, the plaintiff might very reasonably have anticipated that he was an honest man who would settle up in respect of the other half. I cannot find that any tender was made of the 100 bales

for which the defendant has paid differences, virtually invoicing them back to the plaintiff at the difference between the purchase rate and the rate of the day; and that is of course what he ought to have done in respect of the 100 bales now in dispute, and would have done if he had been acting in the spirit as well as the letter of the Rules of the Bombay Cotton Trade Association. For what appeared to me little short of insanity in a business man, namely, after having goods in his hands which he only had to tender in order to ensure great pecuniary gain, he should not have made such a tender, becomes perfectly intelligible as soon as one realises that non-delivery never involves the cancellation of the contract and really leaves the parties practically where they were for settlement at the rate of the day on the day fixed for the performance of the contract. That too explains the class of cases upon which a reference was made by Mr. Hart, when Chief Judge of the Small Causes Court here, to Sir Charles Sargent and Farran J.: see *Vanmali Hargovind* v. *Tarachand Ganeshamdas*[1]. Unfortunately, however, this practice does not take into account the provisions of section 47 of the Indian Contract Act. And the answer given to the reference made by Mr. Hart establishes the simple proposition that any party shown to be in breach cannot approach the Court as a plaintiff in a suit for damages on the contract. That is the unfortunate position of the plaintiff here. Technically he is undoubtedly in breach inasmuch as he did not go through the form of tendering the delivery order, backed by the goods, to the defendant at his place of business at Kalbadevi before 1 p.m. of the 25th of March. Doubtless, realising the difficulty thus placed in his way, the plaintiff sought to overcome it by pleading that he had given

(1) (1891) Chitty and Patell, Collection of cases of the Bombay Small Causes Court, p. 305.

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the defendant the railway receipt for 100 bales of cotton on the 19th of March 1914. He contended that giving a railway receipt was tantamount to giving possession of the goods, and that, inasmuch as the defendant had accepted the railway receipt and did not notify the plaintiff that the goods had not come to hand before due date, he was estopped from pleading that the plaintiff had not made a sufficient tender under Rule 17. That contention, I am afraid, cannot be sustained. In dealing with Bengal cotton (and the contract here is for Bengal cotton), no doubt, if evidence had been called it would have been found that there is a custom peculiar to this branch of the trade and that that custom gives more importance to railway receipts than could be given under a contract in common form such as I have to consider. In every contract intended to be governed by that custom of the trade, I understand that the letters "R. T." (Railway Terms) ought to be inserted. If I found those terms in this contract, then it would have been open to the Court to invite the opinion of persons conversant with the trade to explain what the meaning of the terms was. But there is nothing in this contract, apart from the quality of the goods, to suggest that it differs in any respect from any other contracts made under the rules of the Bombay Cotton Trade Association. Now, doubtless, a person giving a railway receipt for goods which he is bound to deliver before due date ordinarily does so with the object of making a partial realisation of the price. It is in evidence here, though the evidence is not so clear as could be wished, that the party tendering the railway receipt ordinarily expects 90 per cent. cash in advance. But it would still lie on the person bound to make a tender under Rule 17 to satisfy himself that the goods covered by the railway receipt had actually arrived in time. No obligation of that sort appears to be cast upon the takers of the

railway receipt who thereon advance 90 per cent. of the invoice value of the goods. I suppose this practice of giving railway receipts instead of delivery orders is adopted merely in order to secure the advance payment of 90 per cent. of the price, and is not understood in the trade to absolve the vendor from any of his obligations as laid down in Rules 15 and 17. As to that I entertain no doubt whatever. It could not, I think, be otherwise. On a first view, it may seem hard upon a vendor who has given a railway receipt for the goods which, in ordinary course, should arrive long before due date, that his vendee should hold the railway receipt and not inform him that the goods had not arrived, so that he might, in the belief that they had, neglect to tender the delivery order backed by the goods before 1 P. M. on due date. I am assuming here that the defendant did not inform the plaintiff that the goods covered by the railway receipt had not arrived. That is putting the position at the very highest in favour of the plaintiff. But even so, having regard to the practice of advancing 90 per cent. on the railway receipt, I should still be of opinion that it was the plaintiff's duty to satisfy himself that the goods covered by the receipt had actually arrived before due date, and that if he failed to do so he would not be absolved from the obligation of tendering the delivery order backed by the goods according to his contract.

This being my view of the legal relations existing between the parties, the case appears to be one in the eye of the law of extreme simplicity, falling within section 47 of the Indian Contract Act. Under that section, there was a specified time before which the plaintiff agreed to tender the goods sold. When I first read Rule 17, I thought perhaps that the word 'tender' had been loosely used by the framers of those rules without the intention of giving it its ordinary sense or

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making it mean more than the wider word 'give.' If the word had been 'give' instead of 'tender,' then, no doubt, it would have been an open question whether in the facts disclosed here it was for the defendant to ask for the goods or for the plaintiff to offer them. On a reconsideration of the rule, however, I can entertain no doubt but that the framers meant the word 'tender' to have its full legal connotation; for, if he wishes to be on the safe side the vendor is bound to tender without any demand being made by the purchaser; and if he fails to do so, although should he be dealing with an honest buyer he is in no danger of incurring any loss, yet if he is dealing with a dishonest buyer, as in the present case, he clearly precludes himself from having any access to the Courts of law. He cannot come here and complain that he has been damnified by the breach of the contract made between him and the defendant when on his own admission it is he who has first broken the contract. I have already explained that this is technical rather than substantial; and, according to what I believe to be the universal understanding of the market, the plaintiff, in a case like this, would have committed no fault whatever and all the dishonesty would have been on the side of the defendant. But the law, in its extreme zeal to suppress gambling transactions and in its jealous desire to preserve public morality, always succeeds, in my opinion, in ultimately making itself the instrument of injustice and the protector of the dishonest against the honest gambler. Considering that in all mercantile operations on a large scale there must evidently be a considerable element of what the law calls wagering, we find in an instructive case of this kind how hardly the legal doctrine of wagering may often press against the innocent and shield the guilty. It cannot be doubted that but for the apprehension of those whose

transactions must occasionally bring them very close to the domain of wagering and yet who are in every sense perfectly honest dealers, the rules of this Association would have been worded in a much more simple direct and satisfactory manner.

Being perfectly satisfied of the real merits of the case and that on the ground of morality all those merits are on the side of the plaintiff, I shall, in dismissing his suit, direct that each party bear his own costs.

Attorneys for the plaintiff :—Messrs. *Motichand and Devidas.*

Attorneys for the defendant :—Messrs. *Tyabji, Dayabhai & Co.*

Suit dismissed.

G. G. N.

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Before Mr. Justice Macleod.

BOGGIANO & Co. (PLAINTIFFS) *v.* THE ARAB STEAMERS Co., LIMITED (DEFENDANTS).*

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October 21.

The Indian Contract Act (IX of 1872), sections 56, 65—Contract of charter-party—Contract impossible of performance—Freight paid in advance—Export of goods shipped on board prohibited by Government—Claim for refund of freight—Bills of lading—Shipping orders—Common carriers—Carriers by sea—Private carriers—Carriers Act (III of 1865)—Carriers by sea excluded by the Carriers Act—Loss by way of demurrage.

On the 1st April 1915, the defendant Steamer Company entered into an agreement with C & Co., a firm of freight contractors, whereby the latter chartered the steamer Hejaz for a voyage, Bombay to Naples, Genoa, and/or Marseilles, any two discharging ports at charterer's option. Subsequently, the

*O. C. J. Suit No. 966 of 1912.