1921.

DOLA KHETAJI v. BALYA KANOO.

1906, the defendant executed in his favour a *satekhat* to sell the property to him at any time within 12 years for Rs. 395, Rs. 5 being paid as earnest money. The plaintiff filed a suit in 1911 claiming to redeem the property on the ground that the document of the 16th March was a mortgage, seeking the protection afforded by section 10 A of the Dekkhan Agriculturists' Relief Act. That suit was dismissed. Before 12 years had expired the plaintiff sued again to recover the property on payment of Rs. 395. It was contended that that question was *res judicata* as the plaintiff might in his original suit of 1911 have sued in the alternative for specific performance of the *satekhat*. Whether he could have sued in the alternative for specific performance in his redemption suit need not be determined. It certainly cannot be said that he ought to have done so. The two suits were mutually inconsistent and if the plaintiff failed in proving the mortgage, he still had a number of years left under the *satekhat* within which he could have sued to get back the property on payment of the consideration mentioned in the *satekhat*. We think, therefore, the decision of the lower appellate Court is right and the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921.

December 21.

CHUNILAL DAYABHAI & COMPANY (ORIGINAL PLAINTIFFS), APPELLANTS *v.* THE AHMEDABAD FINE SPINNING AND WEAVING COMPANY, LIMITED (ORIGINAL DEFENDANTS), RESPONDENTS*.

Contract—Breach of contract—Damages—Power reserved to the contractor to resile from the contract without incurring liability to pay damages—Refusal to perform—Reasonableness of refusal.

*First Appeal No. 216 of 1920.

The defendants contracted with the plaintiffs to supply manufactured piece-goods, subject to the condition that if the defendants were not in a position to deliver the goods or did not give delivery for any reason, the plaintiffs could only treat the contract cancelled but could not ask for damages for the breach. The defendants having failed to fulfil the contract, the plaintiffs sued them in damages. The trial Court dismissed the suit on the ground that the plaintiffs were, under the contract, not entitled to sue for damages. On appeal :—

Held, that the defendants were bound to justify their refusal to perform the contract, since they could not themselves bring about the state of affairs which would avoid the contract.

New Zealand Shipping Co. v. *Société des Ateliers et Chantiers de France*[1], followed.

FIRST appeal from the decision of M. H. Vakil, First Class Subordinate Judge at Ahmedabad.

Suit to recover damages for breach of contract.

The defendants entered into a contract to supply to the plaintiffs 151 bales of cloth as and when manufactured by them. The contract contained the following condition:—

"If you are not in a position to deliver the goods or if there be any dispute in respect of the goods or if the Company do not give delivery for any reason the utmost that will be the result will be that the 'Soda' will be cancelled but we shall not ask for damage arising from the same from you in any way."

The defendants supplied 90 bales; after which they cancelled the contract.

The plaintiffs sued to recover damages for breach of the contract. The defendants contended *inter alia* that they were unable to fulfil the contract owing to their inability to procure yarn for the manufacture.

The trial Judge did not go into the merits of the defence, but dismissed the suit on the ground that the plaintiffs were not entitled to claim damages for the breach of the contract under the terms of the contract.

The plaintiffs appealed to the High Court.

B. J. Desai, with *G. N. Thakor*, for the appellant.

(1) [1919] A. C. 1.

1921.

CHUNILAL DAYABHAI & CO. v. THE AHMEDABAD FINE SPINNING AND WEAVING CO., LTD.

Coyajee, with *Ratanlal Ranchhoddas* and *H. J. Kania*, for the respondent.

MACLEOD, C. J. :—The plaintiffs sued to recover damages in respect of non-delivery of certain goods by the defendants. Under the contract, which is dated the 17th June 1916, the plaintiffs agreed to purchase certain goods produced by the defendant mill. The contract states :—

"We have purchased goods that are in course of preparation so that we shall take delivery of the goods from time to time as we receive notice from the Company of their being ready. If we do not take delivery of the goods purchased within the period fixed for taking delivery as stated above, you are at liberty to keep the said goods on our account and risk or to sell them either by public auction or by private contract, and we shall make good to you the damage, if any, that you may have to suffer by reason of your having to resel the goods in that way. If we do not take delivery of goods which are purchased under preparation on receiving notice from you or goods to be delivered at a particular period on the expiration of that period, interest at the rate of 6 per cent. and expense of insurance, &c., will run against us so long as the goods remain on our risk and account either in the godown of the mill or in the Company's godown in the market. If the Company's mill stop or if the mill meet with any accident or obstacle or if the mill stop by reason of some circumstance or on account of strike you are at liberty to cancel all the goods written in the contract or the portion that may have remained undelivered without giving us damages. If you are not in a position to deliver the goods or if there be any dispute in respect of the goods or if the Company do not give delivery for any reason the utmost that will be the result will be that 'Soda' will be cancelled but we shall not ask for damages arising from the same from you in any way."

The plaintiffs took delivery of 90 cases out of 151 mentioned in the contract. Then the defendants declined to give further delivery without giving any reason for such refusal. Accordingly the plaintiffs filed this suit for damages. So far as I can see the defence was that the defendants were not obliged to give any reasons according to the terms of the contract for refusing to complete the delivery. The 1st issue raised was whether the plaintiffs have got a cause of action to

sue for damages. The learned Judge held that the clause with regard to the avoidance of the contract for any reason should be read strictly, and, therefore, the defendants were justified in merely refusing to give delivery without assigning any reason, and the plaintiffs had no remedy. The suit was accordingly dismissed. I need not refer to the amendment which was allowed in the plaint so as to include a prayer for specific performance, beyond stating that it was obvious, from whatever point of view we look at the case, that the plaintiffs could not demand specific performance.

Now I do not think that the learned Judge has construed the contract in the proper way. I do not think that those particular words "If the Company do not give delivery for any reason the utmost that will be the result will be that the 'Soda' will be cancelled, but we shall not ask for damage arising from the same" can be read as meaning that the parties agreed that if the defendants simply refused to give delivery, the plaintiffs were bound to accept such a refusal without being able to claim damages, if they wished to do so. It seems to me that the clause evidently means that some reason must be given by the defendants which would justify their refusing to give delivery, and that they were not entitled merely to say that the contract was off because they did not wish to deliver any more goods under it.

A reference has been made to *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France*[a]. The facts there were different, but the principles laid down by their Lordships would apply to a case of this kind. The terms of the contract in that case were—If the construction of the steamer contracted to be built was delayed by an unpreventable cause beyond the

[a] [1919] A. C. 1.

1921.

CHUNILAL DAYABHAI & Co. v. THE AHMEDABAD FINE SPINNING AND WEAVING Co., LTD.

control of the builders, the time for the construction would be extended, and in case the builders should be unable to deliver the steamer within, in the event of France becoming engaged in a European war, 18 months from the date agreed by the contract for completion, thereupon this contract shall become void. Lord Shaw said at p. 12:—

"The answer to the whole of this is clearly put by Bailhache J.—that the stipulation as to the contract becoming 'void' is a stipulation in favour of both parties. This is subject only to this, that the conduct or situation of the party treating the contract as void shall not have been the means whereby the event which gives rise to the condition has been brought about. What I have ventured last to express appears to me to be sound in principle and to be a better and broader expression of the principle than a reference to either a party's own wrong or a party's own default, for without either definite wrong or default the action, or even the situation, of one of the parties may be sufficient to produce the condition. I prefer more than any other as an expression of the principle that which occurs in Coke upon Littleton (206b), and is quoted with approval by Lord Ellenborough in *Rede* v. *Farr*[1], 'for that he himself is the mean that the condition could never be performed'."

Therefore, if the parties agreed in certain events that the contract should become void, that would not mean that one of the parties could himself bring about the state of affairs which would avoid the contract. So that in this case it was not competent for the defendants merely to say that they did not wish to give any further delivery, and that, therefore, the contract should be cancelled without any claim for damages arising in favour of the plaintiffs. The decision of the lower Court was wrong. The case must go back to be tried on its merits. If the defendants are able to satisfy the Court that they had just cause for cancelling the contract, of course it is open to them to do so. The plaintiffs must have the costs of the appeal. Costs in the Court below will be costs in the cause.

SHAH, J.:—I agree.

R. R.

[1] (1817) 6 M. & S. 125.