
(1943) 04 AHC CK 0001
In the Allahabad High Court

Firm Chunni Lal Mansa Ram

APPELLANT

Vs

Firm Sheo Prasad Banarsi Das

RESPONDENT

Date of Decision : 22-04-1943

Acts Referred:

Citation : AIR 1943 All 370 : (1943) 13 AWR 224

Hon'ble Judges : Yorke, J

Bench : Division Bench

Judgement

Yorke, J.—This is a plaintiff's appeal. The plaintiff, Firm Chunni Lal Mansa Ram, which carries on business in molasses at Agra, sued to recover damages to the extent of Rs. 20,655 odd with interest, Rs. 227 odd, and earnest money amounting to Rs. 500 deposited with the defendant along with interest amounting to Rs. 9 odd, a total of Rs. 21,892 odd, on the allegation that the defendant, Firm Sheo Prasad Banarsi Das, Bijnor, (through its proprietor) had without justification broken the contract entered into by the latter for the supply to the former of 80,000 mds. of molasses. The plaintiff's case, put shortly, was that on 4th December 1938 the plaintiff firm and the defendant firm, through their proprietors, entered into a contract for the purchase by the plaintiff and supply by the defendant Sugar Mills of 50,000 mds. of molasses (sheera) at the rate of 1 anna 3 pies per maund. It was agreed that the delivery of the molasses would be taken by the plaintiff in 12 equal monthly instalments of 4200 mds., the delivery of each instalment being taken between the 16th of one month and 14th of the following month beginning from 16th December 1938. The plaintiff in his plaint mentioned some of the terms of the contract (Ex. A-1) but not all of them and he was specifically silent about term No. 6 of the contract which provided that "the responsibility of arranging tank wagons would be solely and entirely on us (the plaintiff firm)." In place of this term it was stated in the plaint that

it was further agreed between the parties that the defendant would make arrangements for tank wagons for the plaintiff at his (plaintiff's) cost as the

Railway Administration did not like to deal with individual merchants in this matter.

2. The plaintiff went on to allege that the defendant failed to make arrangements for the supply of tank wagons from the Railway Administration on behalf of, and at the cost of the plaintiff, in respect of the third instalment and that although the plaintiff actually sent other containers for the transport of the molasses, the defendant refused to take delivery of them and cancelled the contract on 24th March 1939; hence the present claim for damages on the allegation that the plaintiff had all along been ready to carry out its part of the contract but the defendant dishonestly failed to carry out the terms of the contract and thus committed a breach of the contract. The defendant firm in reply contended that the responsibility for the arrangement of tank wagons lay upon the plaintiff firm and that it was only at the special and personal request of the plaintiff, to oblige the plaintiff, that it wrote to the railway authorities for wagons and informed the plaintiff of the results, i.e., the replies received. It contended that in view of the provisions of Section 92, Evidence Act, it was not open to the plaintiff to prove the alleged term which was inconsistent with the terms of the written contract. It further contended that the suit in respect of the value of instalments of molasses subsequent to the date of the institution of the suit (30th May 1939) was premature, and that under the terms of the contract, on the failure of the plaintiff firm to take delivery of the molasses up to 20th March 1939, the defendant was entitled to cancel the contract. In this connection it was pleaded on behalf of the plaintiff that under the terms of the contract the defendant firm had no such right of cancellation.

3. The learned Civil Judge framed a large number of issues, some of which require only a passing mention. Upon these he held that the plaintiff firm was a registered firm and the suit was, therefore, maintainable; that as the defendant had cancelled the whole contract the suit was maintainable for the entire subject-matter of the contract; that Clauses (3) and (4) of the contract were not penal but just and proper in view of the fact that time was of the essence of the contract. He also held that it was shown that the suit was defective in form on the ground that the defendant firm consisted of six partners whereas it had been sued through three of its partners only. The first question of real importance which arose in the suit was covered by issues 2 and 3 which run as follows :

Issue 2--Which party was responsible for supplying tank wagons under the contract in question and which party committed breach of the terms of the contract in this respect ?

Issue 3--Whether the responsibility of supplying tank wagons was taken by the defendant under same contract ? Whether oral evidence is admissible to prove such contract ?

4. Upon these two issues, the learned Civil Judge held in favour of the defendant firm. The contract between the parties took the form of a letter Ex. A-1 written at

Bijnor by the plaintiff firm to the defendant firm on 4th December 1938 and signed by Vidya Ram, proprietor of the plaintiff firm. It was also endorsed as follows : "Confirmed Sheo Prasad Banarsi Das Mills. Banarsi D. proprietor, 4th December 1938." Term 6 of this contract runs as follows : "The responsibility of arranging tank wagons will be solely and entirely onus." It has not been disputed that as this letter was written by Vidya Ram the word "us"" means nothing else but the plaintiff firm. It was, however, contended on behalf of the plaintiff firm that there was an oral agreement by the defendant firm to make arrangements for tank wagons because the defendant firm was in the habit of dealing with the railway authorities. There are two clear answers to this contention. The first is that proof of this alleged oral contract or agreement is barred by Section 92, Evidence Act, which prohibits the admission of evidence of any oral agreement for the purpose of contradicting, varying or subtracting from the terms of any contract the terms of which have been proved by the document itself in accordance with the provisions of Section 91 of the Act. On behalf of the plaintiff firm an attempt has been made to rely upon proviso (4) to Section 92. That proviso permits proof of the existence of any distinct subsequent oral agreement to modify any such contract except in cases in which the contract is by law required to be in writing or has been registered. Prima facie, therefore, it was open to the plaintiff firm to lead evidence of a variation of the written contract only if that variation was made subsequently and not at the same time as the original contract. In the light of the facts and in the light of the pleadings, it is impossible for the plaintiff firm to maintain that this alleged oral agreement was subsequent. In para. 4 of the plaint it is said not that it was "subsequently" agreed between the parties, but that it was "further" agreed between the parties that the defendant would make arrangements for tank wagons for the plaintiff. This can mean only that such an agreement was arrived at in addition to the other items of agreement between the parties. The fact that such request as was made by the plaintiff firm to the defendant firm was contemporaneous with the contract for the supply of molasses, is also clearly shown by the letter Ex. A-2 written by the plaintiff firm and signed by the proprietor Vidya Ram on the same date on which the contract was entered into, (namely, 4th December 1938. It appears to us to be quite clear that proof of any such contemporaneous contract varying the terms of the original contract was barred by the provisions of Section 92, Evidence Act.

5. The second answer to this allegation of a contemporaneous agreement varying the terms of the contract is that there is no satisfactory evidence to prove anything of the kind. On the contrary the evidence of Ex. A-1 which was followed by Ex. 2 written by the defendant firm to the Chief Operating Superintendent, E. I. Railway, Calcutta, on 5th December 1938, goes to show that the plaintiff firm was asking the defendant firm to do it a kindness and the defendant firm was doing what it was asked. Similarly by Ex. A-4 dated 11th December 1938, the plaintiff firm asked what reply had been received from the Chief Operating Superintendent and asked the defendant firm to issue another letter "expressing

pressing needs." This letter was sent by the plaintiff firm by hand through its servant Sidh Nath, on the same date the plaintiff firm sent a letter Ex. A-5 by post. Exhibit A-6 is a letter of 14th December which was also written by the plaintiff firm asking the defendant firm to write another letter to the Chief Operating Superintendent. These letters show nothing more than that the defendant firm was at the request of the plaintiff firm giving assistance to the plaintiff firm to obtain tank wagons to enable it to take delivery of the molasses. It is contended on behalf of the plaintiff firm that the evidence shows that the defendant firm accepted the position of agents of the plaintiff firm for obtaining supply of tank wagons and that having accepted that position the defendant firm could not hold the plaintiff firm responsible for any failure to take delivery of the molasses in due time. It will suffice to say that the evidence is not at all sufficient to prove any agreement by the defendant firm to act as agents of the plaintiff firm for obtaining provision of tank wagons to enable the plaintiff firm to carry out the terms of the contract. In our judgment the learned Civil Judge rightly held on issues 2 and 3 against the plaintiff firm. The remaining questions which arise for decision in this appeal arise out of issues 5 to 8 which were framed as follows:

Issue 5. Whether the defendant firm was disentitled to cancel the contract on account of their own acts and omissions as alleged by plaintiff? Issue 6. Whether defendant was not justified in not delivering molasses for March, and subsequent instalments of molasses in 1939 ? Issue 7. Whether the notice given by the defendant for taking delivery of March instalments to the plaintiff was reasonable or not ? Issue 8. Whether there has been any breach of contract and if so by whom and what is the effect of such breach on the case ?

6. These issues at once raise the question of the interpretation of the terms of the contract. The contract is a contract for the purchase of 50,000 maunds of the molasses from the Bijnor factory, that is the Sugar Mills at Bijnor, at Re. 0-1-3 per maund net F. O. R. Mills Siding of the defendant firm. By term 2 the plaintiff firm stated that they were enclosing a cheque for Rs. 500 as earnest money against "this contract which will become refundable only on the completion of this contract." Terms 3 and 4 must be reproduced in full. They run as follows:

3. The deliveries will be effected in equal monthly instalments, i. e., 4200 maunds monthly with effect from 15th December 1938, till 14th December 1939. If any instalment of 4200 maunds of any month is not removed within time i. e., up to the 15th of each month, you will be at liberty to deal (sic) the above contract at your option, either to cancel, resell or drain it out the molasses at our risk and responsibility on 20th of the month, we will be responsible for all losses.

4. If the delivery of any instalment is not taken by us within the due time, the earnest money deposited with you as mentioned above will be forfeited. In that case you have the discretion to demand further earnest money and we will have no claim on such forfeited sum.

7. It is, of course, evident that in term 3 of the contract after the word "deal" it is necessary to add the word "with." It is equally obvious that the word "it" after the words "resell or drain" is redundant and must be left out of consideration. It can only mean, as explained immediately after words, "molasses." Some question has been raised as to whether time was of the essence of the contract. In our judgment there is no room for argument on the point. The defendant firm had a limited amount of tank (not tank wagon) space for storing the molasses which is one of the waste products of a sugar factory. Any one who has had any acquaintance, even passing acquaintance, with sugar factories in the early days of sugar factories of the modern type cannot be unaware that the disposal of the molasses presented great difficulties to the factories until a market was found for the molasses. The plaintiff firm in its letter Ex.A-2 asked the defendant firm to write to the Chief Commercial Manager mentioning that it had plentiful old stock of the molasses of the last year for which it had certain tank wagons already in use and that it would want 5 more tanks reserved for the factory for delivery of the molasses of the new season and the balance of the old molasses. The defendant firm wrote in its letter to the Chief Operating Superintendent, Ex. 2 of 5th December 1938,

we have sufficient stock of our (last) season's molasses which we want to be removed. Our factory has also started and we are feeling great difficulty in storing these molasses.

8. The terms of the agreement Ex. A-1, paras. 3 and 4 which we have quoted above, also make it perfectly clear that time was of the essence of the contract and that in the event of failure on the part of the plaintiff firm to take delivery up to certain specified dates, the defendant firm was given certain options, both of them of a fairly strict nature. A suggestion has, however, been made of the plaintiff firm that the defendant firm had already waived the application of these two terms of the contract. There is evidence on the record to show that a tank wagon holds from 500 to 550 mds. of molasses. The plaintiff firm had to take delivery of 4200 mds. approximately eight tank wagons' load between the 15th of one month and 15th of the next. Between 23rd December 1938 and 2nd January 1939 the defendant firm admittedly received eight tank wagons from the railway administration in connexion with the supply of molasses to the plaintiff firm. For that month, therefore, there can be no doubt that the plaintiff firm complied with the terms of the contract and to take delivery of something between 4000 and 4200 maunds. Between 15th January and 15th February only 5 tank wagons were supplied to the defendant firm for delivery of the molasses to the plaintiff firm. The result was that during the month from 15th January to 15th February the plaintiff firm fell short by some 2 to 3 wagons load of taking delivery of the full amount of 4200 maunds. Two wagons more were obtained by the plaintiff firm, one on 27th February and the other on 1st March. Thereafter no other tank wagon reached Bijnor in connection with the supply of the molasses by the defendant firm to the plaintiff firm.

9. It does not appear to us that the fact that the defendant firm did not choose to enforce terms 3 or 4 of the contract on account of the plaintiff firm's failure to take full delivery in February, could in any way operate as a total waiver of the rights given by those two terms. The defendant firm could at any time in future enforce those conditions with reference to the instalment of any future month. On behalf of the plaintiff firm an attempt has been made to argue that subsequent to the de facto waiver in respect of the month between 15th January and 15th February there was a promise by the defendant firm to the plaintiff firm not to enforce the conditions laid down in the agreement in connection with the February-March instalment. For this purpose learned Counsel has taken us through the whole of the correspondence between the parties beginning with the plaintiff firm's letter of 21 February and ending with a lawyer's letter written on behalf of the plaintiff firm to the defendant firm on 11th April. On 21st February 1939 the plaintiff firm in Ex. 5 wrote that it had been informed by its man at the defendant's mill (that is Sidh Nath) that the defendant firm had become somewhat careless in complying with its requests about the despatch of molasses as a result of which the plaintiff firm was receiving tank wagons in less quantity in these days. The letter went on to request the defendant firm to comply promptly with Sidh Nath's request about sending letters and telegrams at the plaintiff's cost to the railway for tank wagons as soon as possible. On 23rd February Sidh Nath himself wrote a letter to his employer, the plaintiff firm, Ex. 14, stating that he had tried that the millowners (the defendant firm) might write a letter or send a telegram to the railway to get tanks, and that the millowners had written a telegram, but he could not say that it had actually been sent. This letter also contains a statement that the Seth (defendant) had said to him (Sidh Nath) and the other traders that he would not raise any question of the delivery being taken by them and that he could not say anything "of that sort" when they, the traders, were by no means at fault. This letter and a subsequent letter of Sidh Nath, Ex. 13, dated 3rd March 1939 in which a somewhat similar suggestion was made were sought to be proved by Vidya Ram plaintiff. It is true that Vidya Ram could be allowed to depose to the receipt of these letters and even to say that in consequence of receiving these letters he took certain action or he did not take certain action, but the evidence of Vidya Ram is no proof of the truth of the contents of the letters or of the statements contained in them. The plaintiff called Sidh Nath as a witness but neither of these letters was put to Sidh Nath when he was examined on commission. No one was asked to depose that the proprietor of the defendant firm at any time undertook to waive the conditions of term 3 or 4 of the contract. The learned civil Judge rightly held that such evidence as Sidh Nath did give, namely, that the defendant firm all along told him that they would supply him with tanks at a time after the sugar had been loaded could not be relied upon. The statements made in the letters at the time might have had some value if they had been repeated in evidence so that they could have been made the subject of cross examination. The statements as they stand in the letters written by Sidh Nath, are not even admissible in evidence as proof of the facts stated.

10. The plaintiff firm in its letters to the defendant firm never suggested any such waiver, but beginning from 15th March they began to allege that the entire responsibility for the supply of tank wagons had always lay with the defendant firm. Incidentally the conduct of the plaintiff firm in this connexion is by no means above suspicion. The defendant firm on 13th March sent a notice Ex. A-7 to the plaintiff firm which has not been printed and to which, therefore, it is not open to us to refer save only in so far as its contents appear from the judgment of the Court below. The learned Judge quotes it as follows:

Therein it was made out the plaintiff firm had failed to take delivery of required quantity of molasses for February 1939 even and by 15th March delivery of 12,600 mds. (must) be taken, failing which defendant firm would exercise the option given by Clause (3) of the contract.

11. This was a registered letter and should have been delivered to the plaintiff firm at Agra on 14th or 15th March. The plaintiff Vidya Ram says that it was not received till the 16th and there is no proof as to the actual date of delivery. But the fact that the plaintiff firm wrote to the defendant firm on 15th March putting the whole blame for non-supply of tank wagons on the defendant firm and ending with the request that the defendant firm would be pleased to send to the plaintiff firm the entire molasses of the previous month as well as the molasses of the month of March at their earliest convenience, suggests very plainly that the plaintiff firm had either received Ex. A-7 or was aware of its contents. Thereafter on 18th March the plaintiff firm wrote a letter Ex.8 in reply to the notice Ex. A-7 and stating incorrectly that 200 drums (each of which is said to hold 8 mds.) were being sent "to-day" and that they would be sending more for removing the molasses, although in fact only 145 drums were despatched and even these were not despatched until 20th March. In this letter, the plaintiff firm informed the defendant firm that they were not entitled to take undue advantage of Clause (3) of the agreement as the delay in taking delivery was due to the defendant firm intentionally causing loss to the plaintiff firm.

12. Earlier in the letter the plaintiff firm had accused the defendant firm of failure to comply with the request to write for tank wagons. On 20th March the plaintiff firm actually sent the railway receipt for 145 empty drums and again abused the defendant firm for its unhelpfulness, remarking "all that we can say is that you are trying to find out some excuse for taking undue and improper advantage of your conditions." Two further letters were written on behalf of the plaintiff firm evidently by a lawyer, one on 5th April and the other on 11th April 1939, Ex. 12 and Ex. 11. In Ex. 12 the allegation was repeated that there was an agreement between the defendant firm and the plaintiff firm under which the defendant firm was to arrange with the railway for wagons at the cost of the plaintiff firm. It is important to note that in none of these letters was the suggestion ever made that the defendant firm had at any stage waived or agreed to waive the application of terms 3 or 4 of the contract Ex. A1. In our judgment there is not the slightest force in the contention that there was at any time a waiver of these

terms or an undertaking that they would be waived. Upon the evidence on the record it is clear and not disputed that the plaintiff firm did fail either to take delivery of or to remove the whole of the third instalment 4200 mds. of molasses valued at about Rs. 328 according to the contract price, within the specified time. He had failed first of all to remove them by the 15th or up to the 15th and finally he had completely failed to remove them up to the 20th. It is clear, therefore, that the plaintiff firm had committed a breach of terms of the contract.

13. The next question which arises in the case is what is the effect of the breach of the terms of the contract and to what rights did it give rise for the benefit of the defendant firm. For the defendant, it has been contended, and the learned civil Judge has upheld this contention, that the defendant firm was entitled to cancel the whole contract for 50,000 mds. or whatever remained undelivered. He might also have forfeited the earnest money under the provisions of condition 4, but he did not choose to apply that condition so far at any rate as appears from the correspondence. For the plaintiff, it is contended that this was not a single contract but 12 separate contracts for the supply of 4200 mds. each at an agreed price. The learned civil Judge made a careful examination of the terms of Clauses 3 and 4 of the contract. It was argued before him, as it has been argued before us, that Clause 3 only provided for non-removal of molasses and that it would only come into effect after delivery had been made at the Mill's storage tank and would, therefore, apply to a case in which the plaintiff firm took delivery of the molasses in a tank wagon or in drums on the defendant's premises, but after having done so failed to remove the goods from the defendant's premises, while Clause 4 provided only for failure to take delivery in time. There was in this connection some argument before us about the passing of property in the goods, but in our judgment there can be no question of the passing of property to the plaintiff by this so-called taking delivery of the goods in tank wagons or drums because in fact it was agreed in Clause 5 of the contract that effective delivery to the plaintiff firm would be against cash. Clause 5 runs as follows :

The railway receipt will be sent either by V. P. P. or through bank according to our instructions. If we will deposit the amount of cost in advance over the above earnest money the railway receipt will be sent to us direct.

14. There could, therefore, be no question of the passing of property merely by the molasses being filled into tank wagons or drums as the goods were still undelivered and the property would pass on payment of the money only. The learned civil Judge ultimately rejected the above argument because he held that when the plaintiff firm failed to take delivery of the molasses it also failed at the same time to remove the molasses an ascertained quantity of which was being offered by the defendant. That is one way in which it is possible to look at the terms of the contract. We are however inclined to think that reading these two Clauses 3 and 4 of the contract together it is important to note that by Clause 3 the plain, tiff firm was given time ordinarily to take delivery up to the 15th of each month, but he was also given five days grace up to the 20th of the

month. The intention of the parties was, as it appears to us, that if the plaintiff firm failed to take delivery within time, that is up to the 15th of the month, the defendant firm was entitled to forfeit the earnest money. If at the end of the period of five days grace further allowed by Clause 3, the plaintiff firm had not removed the molasses, then the defendant firm was en-titled to enforce the conditions of Clause 3.

15. Learned Counsel for the plaintiff-appellant sought strenuously to argue, and the same contention was put before the lower Court, that Clause 3 only applied to cases where delivery had been taken but the goods had not been removed. It appears to us that in order to maintain this contention, it is necessary to add to Clause 3 certain words which do not form part of that clause. Learned Counsel has asked us to treat this clause as if after the words "if any instalment of 4200 mds. of any month is" there were to be added the words "taken delivery of but" before the words "not removed within time." We do not think that that is a proper method of interpretation. Learned Counsel has next sought to urge that Clause 3 of the contract does not give a right to cancel the whole contract, but only a right to cancel the contract so far as it relates to the instalment of 4200 mds. of which delivery has not been taken. We have already observed that Clause 2 of the contract speaks of "earnest money against this contract which will become refundable only on the completion of this contract." This is the only place in which the word "contract" appears earlier than in Clause 3. By Clause 3 it has been provided, as already mentioned, that

if any instalment of 4200 mds. of any month is not removed within time, i. e., up to the 15th of each month, you will be at liberty to deal (with) the above contract at your option, either to cancel, resell or drain (it) out the molasses at our risk and responsibility, on the 20th of the month, we will be responsible for all losses.

16. In our judgment, bearing in mind the wording of the contract as a whole, the words "above contract" can mean nothing different from the words "this contract" in Clause 2 of the contract, that is to say, they can refer to nothing else than the whole contract for the purchase of 50,000 mds. of molasses at 0-1-3 per md. This clause, therefore, on its plain wording, in our judgment, provides for the cancellation of the whole contract on the 20th of the month in certain specified circumstances. It gives the defendant firm an option to cancel the whole contract, to resell the molasses or to drain out the molasses, that is, to drain the molasses out of their (defendant firm's) tanks. It is perfectly true that presumably the molasses which would be for supply to the plaintiff firm in the months of March. April-May and so on would not as yet be present in the defendant firm's storage tank or tanks, but we do not think that that has any effect. No doubt the defendant firm would not exercise the option to drain out the molasses in the sense of throwing it out in the fields or wherever else it might be possible to dispose of it if it could dispose of it profitably by reselling it. But the clause at any rate deprives the plaintiff firm of the right to claim delivery.

17. Before leaving this part of the case, we would note that the interpretation of

Clauses 3 and 4 suggested in argument before the lower Court and again before us leads to an absurd position. Suppose the plaintiff never goes to the defendant for delivery of the molasses but leaves the defendant in ignorance of what its intentions are, the earnest money only would be liable to be forfeited. Suppose on the other hand the plaintiff goes and takes delivery in drums or in tank wagons, but through some unfortunate mischance fails to remove the full drums or wagons from the premises of the defendant, the defendant is given a right to cancel the whole contract and resell the molasses. In support of the contention, that in law the breach of the contract by the plaintiff in respect of the instalment for the period from 15th February to 15th March entitled the defendant to cancel the contract only in respect of that particular instalment, we have listened to a lengthy argument. The foundation of the whole matter is Section 38, Sale of Goods Act. As we have already said, upon the plain wording of Clause 3, we see no reason to doubt that the right of the defendant was to cancel the whole contract. Section 38, Sale of Goods Act, provides as follows:

(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

18. The question in effect is whether this is a contract for 50,000 mds. with an arrangement as regards delivery, or 12 separate contracts. It has been held

that in applying Sub-section (2) of Section 35, Sale of Goods Act, 1893, to a particular case, the main tests to be considered are, first, the quantitative ratio which the breach bears to the contract as a whole, and secondly, the degree of probability that such a breach will be repeated, vide *Maple Flock Co. Ltd. v. Universal Furniture Products (Wemby), Ltd.* (1934) 1 K. B. 148.

19. The ratio here is as 1 to 12, but in the light of the history of the case it would be fair to say that the degree of probability that such a breach, as had already occurred, would be repeated, was very high indeed. Learned Counsel for parties have sought to base some arguments upon two earlier cases. One is *Simpson v. Crippin* (1873) 8 Q. B. 14. That was a case in which

the defendants agreed to supply the plaintiffs with from 6000 to 8000 tons of coal, to be delivered into the plaintiffs' wagons at the defendants' collieries, in equal monthly quantities during the period of twelve months, at 5s. 6d. per ton. During the first month the plaintiffs sent wagons to receive only 158 tons. Immediately after the first month had expired, the defendants informed the

plaintiffs that, as the plaintiffs had taken only 158 tons, the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal. Held that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract.

20. Learned Counsel has referred only to the last sentence to the judgment of Lush J. where he said:

I cannot understand the judgments in *Honre v. Rennie* (1860) 5 H. & N. 19. The Court must have interpreted the contract in that case as if time were of its essence; there are no words here which import such a condition. If the parties intended that a breach of this kind should put an end to the contract, they ought to have provided for it by express stipulation.

21. The implication of these words is that in *Simpson v. Crippin* (1873) 8 Q. B. 14, the learned Judges of the Queen's Bench were of opinion that time was not of the essence of the contract in suit. It seems to us to be clear that in this case time is of the essence of the contract and there is an express stipulation that a breach of this kind should give the defendant a right to put an end to the contract. For the respondent a reference was made to the later case in *L. R. Honck v. Muller* (1881) 7 Q. B. D 92. In that case the defendant in October 1879, sold to the plaintiff, and the plaintiff bought of the defendant, 2000 tons of pig iron at 42s. a ton, to be delivered to the plaintiff free on board at..., "in November 1879, or equally over November, December and January next, at 6d. per ton extra." The plaintiff failed to take delivery of any of the iron in November, but claimed to have delivery of one-third of the iron in December and one-third in January. The defendant refused to deliver these two-thirds and gave notice that he considered that the contract was cancelled by the plaintiff's breach to take any iron in November. It was held, in an action by the plaintiff for damages, in respect of the defendant's refusal (Brett L. J., dissenting),

that by the plaintiff's failure to take one-third of the iron in November, the defendant was justified in refusing to deliver the other two-thirds afterwards.

22. The decision in *Honre v. Rennie* (1860) 5 H. & N. 19 was held to be right by Bramwell and Baggallay L. JJ., and wrong by Brett L. J. The argument in this case was that there was an indivisible contract for the sale to the plaintiff of 2000 tons of iron with two alternative modes of delivery, that the plaintiff not having taken delivery at all in November, made it impossible for himself to carry out the terms of the contract, and therefore, the defendant was entitled to treat the contract as rescinded. These two cases are cases, however, which are not, in our judgment, either of them, applicable to the present case in which there is an express stipulation, and, if it were necessary to say anything more, it is only that, for the case where there is no such stipulation, the most recent view of the law is that set out in *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembly), Ltd.* (1934) 1 K. B. 148. The matter has been put in a slightly different form in a

Calcutta case of 1930 (two years prior to the enactment of the Sale of Goods Act) in *Khettra Mohan Dey and Co. Vs. Benode Behary Sadhu*, . The headnote runs as follows :

The mere fact that a party has committed a breach of a term of the contract, with reference to the first instalment in which the goods are to be delivered, does not, in itself, entitle the other party to treat the contract as at an end. But where the breach has been such as goes to the root of the contract the party in default cannot insist on the remainder being carried out.

23. A entered into contract with B for 300 tons of goods to be delivered in January and February in two instalments. B was willing to deliver the January instalment but A not being ready to take delivery, B intimated to him that B treated the contract as cancelled. A later on, made a tender of moneys and demanded the February instalment but B refused to admit the contract as subsisting. A thereupon brought suit for damages for breach of contract. It was held that

the contract was a single contract with" a subsidiary agreement as to delivery and payment, and A having failed as regards no less than one-half at the outset of the contract, it would be in effect putting upon B a different contract if A were allowed to insist on performance of the second half. A's suit insisting on performance of the contract could not lie.

24. In this case reference was made to the cases quoted before us and to some others. In the course of the decision, referring to the decision of the House of Lords in *Mersey Steel & Iron Co., Ltd. v. Naylor Benzam & Co.* (1884) 9 A. C. 434, Rankin C. J., remarked :

But it appears to me to be equally clear that the House of Lords did affirm the proposition that, if the breach that had taken place was one which went to the root of the contract, the consequence was that the party who was in default could not insist upon the remainder of the contract being carried out.

25. We do not think that this case takes the matter any further than, if as far as it is taken in *Maple Flock Co. Ltd. v. Universal Furniture Products (Wemby), Ltd.* (1934) 1 K. B. 148. In the present case, by his failure to take delivery of the March instalment of the molasses, the plaintiff, putting tank wagons" capacity at their highest, had taken deficient delivery up to date by 4350 mds. Even if he took excess delivery by 10 per cent. in every future month (as allowed by para. 7 of the agreement) the plaintiff could not carry out the agreement as a whole and complete his purchase of 50,000 maunds, while the probability of further breaches of the contract on the part of the plaintiff was obviously very great indeed. Secondly, it appears to us that this is not a case in which we have to apply the principles of the law, or of the decisions, as if they were to be the only guide. On the contrary, this is a case of a contract in which there are express conditions entitling one party, in certain circumstances, to cancel the whole contract. Lastly, we cannot by any means interpret the present contract as

divisible into 12 separate contracts or hold that the breach of contract which has taken place on the part of the plaintiff is a sever-able breach giving rise to a claim for compensation only. In our judgment, it is impossible, after the word "cancel" in Clause (3), to read the word "instalment" as suggested by the learned Counsel and obvious meaning of the clause is that it gives to the defendant firm a right to cancel the whole contract and not merely one instalment, as also to re-sell or drain out so much of the molasses as has not been actually delivered to and removed by the plaintiff.

26. In our judgment, the learned civil Judge rightly held that the defendant firm was not disentitled to cancel the contract and was thereafter justified in cancelling the subsequent instalments, that the notice given by the defendant for taking delivery of March instalment was reasonable and that there had been breach of contract by the plaintiff giving a right to the defendant to treat the whole contract as repudiated. It follows that, the plaintiff's suit was rightly dismissed save in so far as it was decreed for the return of the earnest money, which had not been forfeited by the defendant under the terms of the contract. We find no force in the present appeal and dismiss it accordingly with costs.