

(1974) 08 AP CK 0020
In the Andhra Pradesh High Court
Case No : C.C.C.A. No. 23 of 1971

Motilal Srinivasa Sarda

APPELLANT

Vs

The Netha Co-operative Spinning Mills Ltd.

RESPONDENT

Date of Decision : 06-08-1974

Acts Referred:

Contract Act, 1872 — Section 39
Sales of Goods Act, 1930 — Section 38(2)

Citation : AIR 1975 AP 169

Hon'ble Judges : Chinnappa Reddy, J;A.V. Krishna Rao, J

Bench : Division Bench

Advocate : M. Ramamohan Rao, for the Appellant; B.K. Seshu, for the Respondent

Final Decision : Dismissed

Judgement

A.V. Krishna Rao, J.—The plaintiff's firm is the appellant. The suit was filed for recovery of Rs. 51,915.14. The said amount included a claim by way of damages for breach of contract committed by the defendant and also for unpaid sale price inclusive of interest. The trial Court decreed the suit in respect of the unpaid sale price and dismissed the suit for damages for breach of contract. There is no appeal by the defendant re-garding this portion of the decree and that has become final.

2. The case of the plaintiff in the plaint is that it is a firm carrying on business as suppliers of different varieties of cotton to several cotton Textile Mills. The defendant is one such mill. The defendant had placed orders for the supply of cotton bales of Koppal Lakshmi Variety by their letters dated 7-5-1963 (Ex. A-1) and 8-6-1963 (Ex. A-2). By the order dated 7-5-1963 the plaintiffs were to supply 300 bales, while by the order dated 8-6-1963 they had to supply 300 bales of cotton. Pursuant to the order dated 7-5-1963, the plaintiff had supplied 50 bales of cotton on 7-6-1963. The defendant had paid only a portion of the money and there was a balance of Rupees 6,543.23 due from the defendant in

respect of that supply. On 24-6-1963 the plaintiff had supplied another consignment of 50 bales of cotton pursuant to the order dated 7-5-1963. Out of the said 50 bales, three bales were opened and after approval by the Spinning Supervisor of the defendant mills, they were taken delivery of by the defendant. On 24-6-1963 P W. 1 a partner of the plaintiff-firm went to the defendant for receiving the payment. It was stated then that the Spinning Master of the defendant mills was away and that they would like to get the cotton tested by him. However, the defendant by its letter dated 24-6-1963 (Ex. A-6) had intimated that they rejected the consignment of the 50 bales delivered on 24-6-1963 and also refused to take delivery of the remaining cotton bales under the contracts dated 7-5-1963 and 8-6-1963. The defendant had unlawfully terminated the contract, though the cotton supplied was according to specifications. The supply of cotton in 1963 could only be done if there was a survey certificate issued by the Regional Textile Commissioner appointed by the textile Commissioner of India. The 50 bales supplied on 7-6-1963 which were accepted by the defendant and the 50 bales supplied on 24-6-1963 were all covered by the same survey certificate, Ex. B-1 and were of the required standard. The plaintiff was ever ready and willing to perform the obligations under the contracts. The defendant by refusing to take delivery and terminating the contracts was guilty of breach of contracts. As per Exts. A-1 and A-2. the rate agreed to was Rs. 1090/- per candy and the market rate in the months of August and September was Rs. 961/- per candy. The plaintiffs are, therefore, entitled to the difference between the contract rate and the market price by way of damages. In the cause of action paragraph, it was stated inter alia that the cause of action arose on 26-6-1963 when the defendant had by its letter purported to terminate the contracts.

3. The defendants in the written Statement had stated that even with regard to the delivering of the 50 bales on 7-6-1963, four bales were found to be not in accordance with the quality agreed to be supplied and set out facts which according to them did not involve them in any liability to pay Rs. 6543/- in respect of the delivery. Regarding the supply of 50 bales on 24-6-1963, it was stated that those bales were examined in the presence of Srinivasa Sarda (P. W. 1). a partner of the plaintiff-firm and it was found that the cotton was not of the approved quality and hence the defendant had rejected those 50 bales. He said that cotton was sent to a Cotton Expert who had certified that the cotton contained willowed roving. It was contended that the plaintiffs deliberately committed breach of contract by not supplying cotton contracted for, but by supplying cotton mixed with willowed roving. It is denied that the 100 bales i.e., 50 bales supplied on 7-6-1963 and the 50 bales supplied on 24-6-1963 were covered by Ext. B-1 survey certificate, either regarding quality or the price of cotton. The plaintiffs had never either orally or in writing requested the defendant to take delivery expressing his readiness before September. 1963, which was the time fixed for delivery. The defendant denied the liability to pay any damages. It was further urged that the suit was barred by limitation.

4. The trial Court found under the appropriate issues framed by it that the cotton supplied on 24-6-1963 was inferior and defective in quality containing willowed roving and waste cotton and that the same entitled the defendant to reject the goods by repudiation of the contract. It was found that on the facts the defendant was entitled to repudiate in entirety both the contracts, Exs. A-1 and A-2. The Court also held that the plaintiff on whose behalf it was argued that they had chosen to keep the contracts alive even though the contracts were unilaterally repudiated by the defendant could not claim any damages because the plaintiff had not proved the tender of performance before September 1963. The Court below had thus decreed for Rupees 6543.23 which represented the balance of sale price in respect of the delivery of 50 bales on 7-6-1963 and dismissed the rest of the plaintiff's claim,

5. Ext. A-1 dated 7-5-1963 and Ext. A-2 dated 8-6-1963 represent the letters signed by the defendant which contained the terms of the contract between the parties. The terms in both are substantially the same except with regard to the quantity of the bales to be supplied. The subject-matter of the contract as per Ext. A-1 was the purchase of Lakshmi Cotton (new crop) against valid quota issued by the Textile Commissioner for the season 1962-63. The purchase and supply was in respect of 300 bales of Koppal Lakshmi new crop cotton (27/32). The quota had to be supplied at the rate of Rs. 1090/- per candy delivered at the mill of the defendant. The delivery was subject to the issue of Survey Certificate by the Zonal Committee. Even if the price fixed by the Survey Certificate was put less than the contract rate, the payment would be made according to the Survey Certificate. The supply of cotton should conform to the sample approved by the defendant. If at the time of delivery and inspection or it was noticed at any stage that the cotton supplied to the defendant was not either as Per the sample or the usual standard as the case may be the plaintiff had either to replace the stock or to make alternative arrangements to suit "the mixing purpose" at the plaintiff's cost or allow reduction in the prices as might be mutually agreed upon. The supply was to be made in lorry loads from time to time according to the indents placed, subject to a minimum of 50 bales at a time. The supplies were to be completed by September, 1963. In Ex. A-2 the terms are the same except that the contract was regarding the supply of 200 bales of Kopal Lakshmi cotton. The supply of cotton under Ex. A-2 had to be completed by August-September 1963. On 7-6-1963, the plaintiff had supplied 50 bales of cotton. We are not in this appeal concerned with this delivery. According to the defendant, four of the bales supplied under this contract were not of the quality. Though they repudiated their liability to pay in respect of this cotton, it is in evidence that they have used this cotton in the mills and the trial court gave a decree as stated earlier.

6. On 24-6-1963, the plaintiff sought to deliver at the mills 50 bales of cotton brought by lorry. P. W. 1 was present at the mills at the time of the delivery. According to the plaintiff, the 50 bales supplied on 7-6-1963 and the bales supplied on 24-6-1963 formed part of one lot and that one lot consisted of 100 bales. The plaintiff would have it that on that day the 50 bales were weighed and

approved by the spinning Supervisor of the defendant. Regarding the payment of 75 per cent, of the value, the Special Officer of the defendant told him that the payment would be made in the evening. When he went there, he was told by the Special Officer that the Spinning Master was on leave and that after ascertaining the quality of the goods once again the price would be paid. The 50 bales therefore were left in the mill of the defendant. It is not clear whether the plaintiff went there again to the mills on 25-6-1963. But on 26-6-1963 Ext. A-6, a letter from the defendant was sent to the plaintiff. It referred to the contracts. Exts. A-1 and A-2, and stated that the bales of Koppal Lakshmi cotton supplied by the plaintiff were examined in the presence of the plaintiff. The cotton was found to be not satisfactory. It was, therefore, rejected, under the orders of the Chairman and the plaintiff was asked to replace the same. This replacement, it is not disputed, referred to the first consignment of 50 bales delivered on 7-6-1963. As stated earlier, we are not now concerned with this first consignment. The relevant portion of this letter is where it is stated that the defendant received on 24-6-1963 further stock of 50 bales Koppal Lakshmi Cotton, that of that three bales were opened and examined in the presence of the plaintiff. It was found that the cotton was mixed with willowed roving and therefore was not found to be satisfactory. The whole supply of 50 bales had been rejected. The plaintiff was requested to make arrangements to take back the stock. The plaintiff was also informed that further supply of cotton should be stopped. As the letter referred to both Exts. A-1 and A-2 it is quite clear that the defendants had asked the plaintiffs not to supply any more cotton either under Ext. A-1 contract or Ext. A-2 contract. To this letter, the plaintiff sent a reply the very next day as per Ext. B-2 on 27-6-1963. In Ext. B-2 the letter, Ex. A-6 was acknowledged. The plaintiff expressed regret that Ex. A-6 contained false allegations that willowed rovings had been mixed in the lot of 50 bales. It also admitted that three out of the 50 bales were opened. The Spinning Supervisor of the defendant mills had approved the quality and told the plaintiff that he was fully satisfied with the same. When in the evening the plaintiff had approached the defendant for a cheque for payment, the same Spinning Supervisor changed his stand and wanted the Spinning Master who was on leave to give his opinion regarding the cotton. This was agreed to and the arrival of the Spinning Master was awaited. That being the position, the plaintiff expressed surprise as to how the defendant could decide that the cotton was mixed with willowed roving when there was no Expert present to examine the cotton in the defendant's mills. The plaintiff expressed the belief that some persons were trying to carry on anti-propaganda against the plaintiff. The letter wound up with an assurance that not a single ounce of willowed roving was mixed in the cotton and that the decision of the Spinning Master of the defendant would be accepted by the plaintiff. There was no reply by the defendant to the plaintiff. On 9-7-1963 as per Ext. B-3, the plaintiff had written to the defendant expressing their regret that there was no specific response to their letter of 27th June (Ext. B-2) and that the 50 bales of Koppal Lakshmi Cotton were lying with them without any purpose. If the defendant did not accept the plaintiff's assurance about the quality the plaintiff

stated that they would consider it proper to remove the stocks without further delay. The letter requested the defendant to hand over the stock immediately. The defendant would appear to have complied with this demand for the return of the bales immediately and returned in all 50 bales -- forty-seven bales of what was stated to be new supply and three bales of the last season supply. In Ext. B-3, the plaintiff did not state that he would either replace the bales found to be not of the quality of the contracted quality or that the defendant had wrongfully refused to take delivery of the future consignment. As on this date, the plaintiff had still time to deliver the goods according to the contract. No such offer was made. This conduct inclines us to think that on 9-7-1963 the plaintiff accepted the position that the defendant would not take delivery of further stocks. They wanted return of the goods which the defendant rejected. Ex. B-4 dated 9-7-1963 from the defendant goes to confirm the fact of the return of the 50 bales on 9-7-1963. Apparently the matter was allowed to rest there and nothing happened until we come to 9-10-1963 when the plaintiff wrote Ext. B-6. Before the end of September 1963, the due date, the plaintiff had made no attempt to fulfil the contract on their part. In Ext. B-6 it was stated that as per Exts. A-1 and A-2 orders, the plaintiff was storing the remaining 450 bales which had to be delivered. It contains a patent falsehood that by the letter dated 26-6-1963 (Ext. A-C) the defendant had asked the plaintiffs to stop the supply till further orders. In fact, Ext. A-6 does not contain any such statement. It was also stated that in spite of regular contacts being made in person, the defendant had asked the plaintiff to wait till it had made financial arrangements for payment. The letter also expressed that the plaintiff had only waited to enable the defendant to get over their financial difficulties incurring loss of interest, insurance etc., on the cotton. As the Government had sanctioned Rs. 10 lakhs to the defendant, the financial difficulty of the defendant was at an end and cotton which had been stocked in compliance with the defendant's orders could be taken delivery of by the defendant.

7. Again Ext. B-7 was written by the plaintiff on 20-11-1963 to the defendant, as there was no reply by the defendant to Ext. B-6. It made a reference to Ex. B-6 and stated that there was no response. The letter stated that under the contract the supply of cotton had to be completed, by September, 1963, that the defendant had not taken delivery of the balance of the stock of 450 bales. The plaintiff complained that their money was blocked by their not taking delivery of the goods and that the overhead charges were mounting up. It also stated that in case the defendant did not take delivery of the 450 bales within a week of the receipt of the letter, the plaintiff would be constrained to sell the goods at their risk and claim appropriate damages. This threat of a claim for damages had shaken the defendant from its lethargy and a reply was sent on 26-11-1963. Ext. B-8 is a copy of that letter. It acknowledged Ext. B-7. A reference was made to Ext. A-6 written by the defendant to the plaintiff on 26-6-1963 wherein they informed the plaintiff that further supplies of cotton should be stopped. This, it was stated, meant the cancellation of the order placed of the supply of 500 bales

of cotton of Koppa Lakshmi variety. It was also stated that the Board of Directors of the defendant mills had decided that the suppliers who were suspected to have supplied bad quality cotton should be black-listed and that the plaintiff had accordingly been black-listed and that the defendant had no desire to have any further dealings with the plaintiff in the matter of supply of cotton. Thereafter the plaintiff sent the notice under Exs. B-9 and B-13 through their Advocate dated 6-11-1963 and 11-4-1964. A suit O. S, No. 17 of 1964 was filed against the defendant. As that suit was defectively instituted inasmuch as the notice required u/s 166 of the Co-operative Societies Registration Act was not issued to the Registrar of Co-operative Societies, it was withdrawn, with liberty to file a fresh suit after giving fresh notice as evidenced by Ex. A-3. Ex. A-4 is the reply sent by the defendant's Advocate to the plaintiff's advocate.

8. The defendant had asked the plaintiff to stop further supplies of cotton by letter dated 26-6-1963 as per Ex. A-6. The ground on which the defendant asked the plaintiff not to effect further supplies of cotton under the contracts was allegedly due to the fact that the cotton contained willowed roving. Apparently, the parties had treated both contracts as a single contract requiring the supply of 500 bales of the particular variety of cotton. If the cotton did not conform to the usual standard, as admittedly in this case there were no approved samples, the defendant would be entitled to insist upon the plaintiff either to replace the stock or make alternative arrangements to suit the mixing purpose at his cost or allow reduction in the prices mutually agreed upon. As can be seen from Ex. A-1 it was for the plaintiff to do one or more of these things. The plaintiff made no such offer in the letter Ex. B-2. That is obviously because they had not by then accepted that the supply of cotton was in any way defective. In the subsequent correspondence also, the plaintiff did not suggest one or other of the alternatives as envisaged in paragraph 2 of Ext. A-1 or A-2.

9. We will now consider whether there was any justification for the defendant to have rejected the consignment of 50 bales on 24-6-1963 on the ground that the cotton was not of the usual standard. It is nobody's case that the usual standard of cotton would contain willowed rovings. P. W. 1 was present on 24-6-1963 when delivery of 50 bales was made. On that date, three bales were opened and there was the Spinning Supervisor of the mills at the time. It is in evidence that the plaintiff was apprised of the defect. Even as the correspondence would disclose he was willing to abide by the opinion of the Spinning Master who was away on leave at the time. But the plaintiff himself had made no effort to get it tested by a cotton Expert. In later letters he did not ask the defendant to get the cotton tested by its spinning Master. On the other hand under Ex. B-3 he expressed his willingness to take back the cotton and asked that it should be re-delivered forthwith, which was done. At that time also, he did not ask that the cotton be examined by an expert. We have the evidence of D. W. 1, who is a retired Director of Handlooms, Government of Andhra Pradesh. He claimed that he had experience in looms in spinning mills for 20 years. He was the General Manager of Andhra Co-operative Spinning Mills, Guntakal. for five years and he

used to look to the selection of cotton for the mills. He had therefore, experience in checking cotton. While he was the Director of Handlooms. he used to go and check the mills. He had once made a surprise check of the defendant's mills along with the Registrar of Co-operative Societies. He found cotton supplied by the plaintiff in the mills. The surprise visit was made because there were several anonymous complaints against the plaintiff. The three bales of cotton supplied to the defendant which were then there were examined. They found waste cotton mix and the cotton was of inferior quality. On the date of the visit of this witness, the Spinning Master also was there. He stated that subsequently there was an enquiry against the then Manager of the Mills one Krishnaswami Ayyar and one of the charges against him concerned the bales supplied by the plaintiff. Consequent upon the enquiry, Krishnaswami Ayyar's pension was reduced. He also stated that thereafter it was directed that no cotton should be purchased from the plaintiff. The comment against the evidence of this witness was that his surprise check must have been a matter of record and that no record was produced. But on the day he was deposing he had retired four years earlier and could not produce the record. Besides that, several times checks are made acting upon anonymous petition as stated by him. Those matters are usually discussed at the Director's Meeting and that no note would be made of them. He admitted that he had no technical qualifications. But he had considerable experience in the working of cotton mills and that experience had been long viz., for over 20 years. We do not see any reason why we should reject the evidence of D. W. 1 when he spoke to the fact that he had examined the bales concerning the supply under the suit contracts. His evidence as to the bad quality of the cotton supplied by the plaintiff in the three bales at the time is supported by the evidence of D. W. 2. D. W. 2 worked as a cotton selector of the Azamjahi Mills for over 25 years. On the date of his deposition, he had retired. He gave Ext. B-14 a, report after checking the cotton sent along with letters Exts. B-15 and B-16 from the defendant. D. W. 2 also was the Cotton Manager. In Ext. B-14 dated 12-9-1963 he stated that on going through the samples, it was found that both samples were mixed with various types of soft wastes in large proportions. Even pieces of threads were traced in small quantities. Exts. B-15 and B-16 are copies of letters sent by the defendant to D. W. 2 on 3-8-1963 and 11-9-1963. Ex. B-15 stated that two samples of Koppal Lakshmi cotton supplied by Messrs. Mutual Srinivas Sarda (Plaintiff) on 24-4-1963 were sent for analysis as the Spinning Master suspected that the cotton was mixed with waste cotton. Ext. B-16 was a reminder to D. W. 2 to send the Test Report at the earliest. We have no reason to reject Exts. B-15, B-16 and the report. Ext. B-14, given by D. W. 2. No doubt he stated that there was no record for the test. We do not think we can give effect to the submission made on behalf of the plaintiff-appellant that there is no satisfactory evidence that the samples sent to D. W. 2 were from the three bales which on examination contained willowed roving etc. Having regard to what we have stated above, we have no doubt that the samples of cotton examined by D. W. 2 relate to the three bales in question. On this material, we are of opinion that the defendant was justified in repudiating the contract.

10. It was then argued by the learned Counsel that Exts. A-1 and A-2 are two distinct contracts and that as per paragraph 4 of the contracts Exts. A-1 and A-2 the supply was to be made in instalments of a minimum of 50 bales at a time and that therefore if at all the defendant could have refused delivery of the consignment of 50 bales sent on 24-6-1963 and should not have repudiated then obligations to take delivery regarding the balance due under Ext. A-1 and the entirety of the supply to be made under Ext. A-2. Such a repudiation by the defendant determining the contract is illegal and improper and that the defendant therefore had committed breach of the contract. It was also urged that what all the defendant, could do was to insist upon the plaintiff replacing the stock or making alternative arrangements to suit the mixing purpose of 20 count yarn or seek a reduction in the price as might be mutually agreed upon as provided in Clause 2 of the contract. Reliance was placed upon Section 38 of the Sale of Goods Act and it reads thus:--

"38 (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 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 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."

In the first flush, the argument appeared to be worthy of countenance. But on an examination of the facts and circumstances of the case, we think we cannot accept the argument. Under Exts. A-1 and A-2, the contracts no doubt contemplated delivery by instalments of not less than 50 bales each time. The price also was to be paid separately as provided under paragraph 3 of the agreement. But as provided for by Section 38(2), it is a question of fact in each case depending on the terms of the contract and the circumstances of the particular case, whether there was a repudiation of the whole contract or whether it was a severable breach giving rise only to compensation.

11. To advert to the facts relevant in this connection, it is in evidence that even with regard to the bales supplied on 7-6-1963 the first consignment of 50 bales the defendant had complained that they were not of the required standard. Nevertheless they would appear to have accepted those 50 bales and used the bales for their production. It is to be noticed that the outside limit for delivery in the case of each of the contracts is September, 1963. In Ext. B-6 dated 9-10-1953, the plaintiff had stated that the defendant had taken delivery of only 50 bales till then and that in respect of the remaining 450 bales the defendant had asked the plaintiff to stop the supply. In Ext. B-7 also it was stated at the top of the letter "Your orders for the supply of 500 bales of Koppal Lakshmi

cotton 7th and 8th June. 1963" and it was stated that in case the defendant had failed to take delivery of the remaining 450 bales "as per the cotton" within a week, they would be constrained to sell the goods at defendant's risk and claim damages. In Ext. A-7 dated 11-4-1964, a registered notice issued by the plaintiff's Advocate to the defendant, it was stated "Please note that you. Vide your orders referred to above, have entered into contract for the purchase of 500 bales at Rs. 1090/- per candy of 784 pounds." To the same effect are the contents in Ext. A-3, another registered notice which was sent to the Registrar of Co-operative Societies on 20-9-1965. On the other hand it appears to us that the defendant-mills also were treating the contracts as one single transaction though of course the deliveries were to be made in instalments (See Ext. B-8) where they stated that their letter dated 26-6-1963 (Ext A-6) clearly meant cancellation of their order placed with the plaintiff for the supply of 500 bales of cotton of Koppal Lakshmi variety. The parties until the stage of the suit understood it to be one of repudiation of one single contract for the supply of 500 bales. The circumstances and the evidence on record make us think that the parties treated Exts. A-1 and A-2 as one single contract and Ext. A-6 amounted to

a repudiation of the whole contract. The plaintiff treated the orders for the supply of 500 bales under the two contracts as an indivisible one and not severable, so that a breach committed in respect of one instalment by the defendant would only give rise to a claim for compensation regarding that one instalment.

12. We may also refer to Section 37 of the Sale of Goods Act which reads;

"Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole."

13. Where goods under a contract are deliverable by instalments, the general rule no doubts is that a breach by one party in connection with one instalment does not by itself entitle the other party to rescind the contract as to the other instalments. But this general rule has a qualification. Where the breach is of such a kind or occurs in relation to sub-sequent deliveries, the whole contract may be regarded as repudiated and may be rescinded. In the particular circumstances. having regard to the fact that even regarding the first instalment of the delivery on 7-6-1963 there was complaint

from the defendants and also the second instalment of the delivery made on 24-6-1963 contained quality of cotton not contracted for in that it was mixed with willowed roving, we think the defendant was entitled to refuse the acceptance of the entire 500 bales.

14. It was then contended on behalf of the appellants that the defendant had unilaterally repudiated the contract and that it was open to him not to accept the repudiation but keep the contract as alive and subsisting and the obligations under the contract in respect of both parties thereafter must be taken to subsist

and that he was ready and willing to perform his part of the contract during all the relevant time and that therefore the plaintiff is entitled to damages.

15. In *N.K.N. Ramier and Brothers Vs. S.S. Ramudu Ayyar and Another*, it was observed:

"In these circumstances, the law seems clear as laid down in *N.K.N. Ramier and Brothers Vs. S.S. Ramudu Ayyar and Another*,

The promisee may treat the notice of intention (to renounce) as inoperative and await the time when the contract is to be executed and then hold the other party responsible for all consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party as well as his own he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. cf. *Leake on Contract*, Edn. 8 p. 675."

The judgment went on to observe that the sellers were still under the obligation of tendering. The sellers in that case elected to keep the contract alive instead of bringing an action which they could have done and thereby reserved the mutual obligations of the parties intact. One of these obligations, as pointed out by the learned Judges in this case, was that they, the sellers, should tender the goods and since they did never tender they could not be heard to say that they could retain the buyer's earnest money on account of the bales.

16. In *State of Kerala Vs. Cochin Chemical Refineries Ltd.*, it was observed by the Supreme Court:

"Breach of contract by one party does not automatically terminate the obligation under the contract: the injured party has the option either to treat the contract as still in existence or to regard himself as discharged. If he accepts the discharge of the contract by the other party, the contract is at an end. If he does not accept the discharge, he may insist on performance. See the judgment of the House of Lords: *White and Carter (Councils) Ltd. v. McGregor* 1962 AC 413 :1961 3 All ER 1178."

It was pointed out by their Lordships that though the case before the House of Lords was a Scottish case, the law of Scotland was not different on the matter from the English Law and that the Indian Contract Act closely followed the English common law in that matter.

17. In *Pollock and Mulla's Indian Contract Act*, IX Edition at page 347. we find the following passage:

"It was settled in Scotland in 1843 and has been the law in Scotland and England that:--

If one party to a contract repudiates it in the sense of making it clear to the

other party that he refused or will refuse to carry out his part of the contract, the other party, the innocent party has an option. He may accept that repudiation and sue for damages for breach of contract whether or not the time for performance has come or he may, if he chooses, disregard or refuse to accept it and then the contract remains in full effect."

18. The learned Counsel for the appellant had relied upon *N.M. Rayulu Aiyar and Nagasami Aiyar and Co. Vs. Thirukonda M. Kuppu Aiyar and Sons* by One of its Partners, *M.K. Ramier*, . In that case, there was a contract dated 20-8-1918. The plaintiffs had to supply to the defendants at Madura 50 bales of 20 count yarn from the factory. Under the terms and conditions provided in the contract, there was no time fixed for the performance of the contract. It was therefore the plaintiff's duty to supply 50 bales within a reasonable time. The plaintiffs gave a notice on 23-9-1913 that 20 bales were ready for delivery at Madura and again informed the defendants on 21st October. 1918 that the remaining 30 bales were ready for delivery. The defendants had taken 5 bales on 5-10-1918 out of the first lot of 20 bales and another 5 bales out of the same lot on 14-12-1918. The defendants did not take delivery of the remaining ten bales of the first lot of 20 bales or of the second lot of 30 bales. In fact the defendants did not inspect the remaining 40 bales which was the subject-matter of the contract. Nor did they send to the plaintiffs any written communication about them. There was evidence in the case that out of the 10 bales which the defendants had taken delivery of the yarn was not of the contract description. Their Lordship observed that it was clear that the defendants by their conduct refused to accept the 40 bales tendered by the plaintiffs without even troubling to inspect them or to ascertain whether they were or were not of the contract description. The defendants were therefore held guilty of breach of the contract for which the plaintiffs were entitled to damages

19. The question that was considered by their Lordships was whether the defendants by their breach in not taking delivery of the other 10 bales after accepting the first 10 bales and not caring to respond to the offer (Underlining ours) made in Ext. D have committed such a breach of contract as to amount to a waiver of all conditions precedent binding on the plaintiffs. There was considerable debate before the Bench as to the true meaning of the decision in *Braithwaite v. Foreign Hardwood Co.*, (1905) 2 KB 543 to which we need not refer, as the discussion would be academic in relation to the facts of the present case. *Ramesam, J.* in his judgment found that the plaintiffs were always not only willing to perform the contract, but if any time the goods they delivered turned out not to be of the correct kind, could have set it right and that all conditions were waived by the defendants by their repudiation. It was also observed that there was no evidence to support any suggestion that the plaintiffs were totally unable and disabled to perform the contract altogether. *Reilly, J.*, in his judgment had observed that in the case before them it had not been proved that the 40 bales in question were not of the contract description and even if they were not of that description, the plaintiffs had still time to supply others in their stead. We

are unable to see how this decision is of any help to the appellant. The defendant in the case had not even inspected the bales which were tendered by the plaintiffs. The defendants who did not take delivery and did not even take the trouble to inspect the goods tendered, committed breach. In the case before us there was never any tender by the plaintiff after the repudiation by the defendant on 24-6-1963.

20. The next case relied upon by the appellant's Counsel is Nannier and Another Vs. N.M. Rayulu Iyer, Nagasami Iyer and Co., . The appeal before the High Court arose out of a suit for damages for breach of contract. The contract dated 27th August, 1918, related to yarn. The parties agreed upon certain terms as to the price and weight of each bale etc. The plaintiffs alleged that the defendants accepted delivery of five bales in accordance with plaintiffs' advice on 2nd September, 1913, but they afterwards did not pay for or take delivery of the remainder of the goods. The plaintiffs, therefore sued for recovery of damages for the difference in price. In the written statement, the defendants pleaded that time was essence of the contract and that the plaintiffs sold the unaccepted goods on 27th January, 1918, could not claim anything, as the plaintiffs had committed a breach on 13th October, 1918. Subsequently, the defendants filed an additional written statement wherein it was urged that an examination of the bales caused to be made by the defendants which were earlier accepted by them showed that the goods offered by the plaintiffs weighed less and that the dye was not fast and that therefore they were not bound to receive the bales. It would appear that in that case the plaintiffs did tender goods. It was held by the trial Court that the plaintiffs were bound to prove that the goods tendered and refused were in accordance with the contract in respect of quality and that the same was not proved. In first appeal, the District Judge on the authority of Nannier and Another Vs. N.M. Rayulu Iyer, Nagasami Iyer and Co., (Supra) held that the trial Court was not justified in its finding. He found that the defendants absolutely repudiated the contract and that the repudiation absolved the plaintiffs from proving any of the conditions preceding, such as the quality of the goods. The High Court in second appeal accepted the District Judge's conclusion, viz., that there was repudiation of the contract by the defendants. The question then considered by them was "Was he (District Judge) right in refusing to permit the defendants to take- advantage of any defects such as non-performance of the conditions precedent to the contract" ? It would appear that a long argument was advanced and Braithwaite's case had again come up for consideration. They referred to the earlier Madras case in N.M. Rayulu Aiyar and Nagasami Aiyar and Co. Vs. Thirukonda M. Kuppu Aiyar and Sons by One of its Partners, M.K. Ramier, and stated that the difficulty in understanding Braithwaite's case, if any, need not affect the decision before them. The Division Bench was of the opinion that the learned District Judge was right in debarring the defendants from setting up in defence their after-acquired knowledge which they did not succeed in establishing. In this case also, there was an actual tender by the plaintiff. The distinguishing feature in our case is, as pointed out by us, with reference to N.M.

Rayulu Aiyar and Nagasami Aiyar and Co. Vs. Thirukonda M. Kuppu Aiyar and Sons by One of its Partners, M.K. Ramier, the plaintiff had not tendered the goods before the due date to the defendant at any time after the defendant had unilaterally repudiated the contract. On the other hand, their Lordships observed in *Nannier and Another Vs. N.M. Rayulu Iyer, Nagasami Iyer and Co.*, as follows:

"The matter is really governed by Section 39 of the Contract Act. In the note to Section 120 of the Act, the learned authors of Pollock and Mulla's Contract Act point out that two courses are open to the promisee when the promisor repudiates. He may either treat the repudiation of the other party as a wrongful putting an end to the contract and may at once bring his action as on a breach of it, or:

He may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance, but in the latter case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it but also to take advantage of any supervening circumstance which could justify him in declining to complete it."

21. What follows from the above discussion is that in the case before us it was open to the plaintiff to have accepted the repudiation of the contract by the defendant-mills on 24-6-1963 and could have sued for recovery of damages. But they have chosen to keep the contract alive according to them. It was certainly open to them to do so. Then if they had chosen to keep the contract alive, they had to perform their obligations under the contract. They must have been ready and willing to perform their obligations by supplying the standard quality of cotton before September, 1963. Admittedly they did not do so. Their conduct subsequent to their letter. Ext. B-2, makes it clear that they had as a fact accepted the repudiation. In Ext. B-3 it was stated by the plaintiff that in case the defendant was not satisfied with the assurance regarding the quality, they would remove the stocks without any further delay and asked the defendant to hand over the 50 bales immediately. Here there was no indication at all of keeping the contract alive. Even if there was, until the first letters Exts. B-6 and B-7 dated 9-10-1963 and 20-11-1963 after the time fixed for performance viz., September, 1963, had expired, the plaintiff had informed that the cotton was stored as per the orders and asked the defendant-mills to take delivery of the 450 bales. Exts. B-6 and B-7 cannot of course avail the plaintiffs in any way because these were written after the expiry of the period fixed for performance. There is absolutely no evidence of any tender by the plaintiff before September, 1963. That being so, assuming they had chosen to keep the contract alive, they had not chosen to abide by their obligations under the contract viz., to tender delivery of the remaining bales. Not having tendered the goods within the contract period, it would not be open to the plaintiff to say that they had kept the contract alive till

the end of September, 1963 and then sue for damages.

22. The plaintiff also has not established his readiness and willingness to perform his part of the obligations under the contract by proving that he had during the relevant period before September 1963, 450 bales of cotton. He averred in paragraph 6 of the plaint that he was ready to perform his part of the obligations under the contract. It was suggested to P. W. 1 in cross-examination that he had no stock for supply under the contract and that therefore he did not produce the stock register. P. W. 1 had stated that he had offered many times in writing and orally to deliver the balance under the contract. We do not find anything in writing in this behalf. We are not prepared to believe that he had made any such offers orally. His stock register is the best evidence which would have shown the existence of stocks with him before the end of September, 1963. On behalf of the defendant-company D. W. 3 had stated that no delivery was offered at any time after Ext. A-6 letter. The only offers, as we have pointed out earlier, were by letters Exts. B-6 and B-7 in October, 1963. We should think that the plaintiff is disentitled to any claim for damages on this ground also. We may also point out that under the contracts, the contracted goods should be supplied subject to the issue of a Survey Certificate by the Zonal Committee as required by the Gazette Notification, Ext. B-21. Ext. B-1 is produced by the defendants as having been handed over by the plaintiff at the time of the delivery of the first 50 bales on 7-6-1963. Ext. B-1 is given by the Zonal Survey Committee at Hubli and is dated 17-5-1963. Though for the seller's name, we find the name of the plaintiff, for the buyer's name no name was given, but is said to be pre-sale. The description of the cotton was "Lakshmi". Number of bales was mentioned to be 100. The press mark was noted as MY 81/62. The running number of bales was given as 2453 to 245 (2552 ?). The maximum price was mentioned as Rupees 332/- per quintal. It is the plaintiff's case that out of these 100 bales in respect of which the above Survey Certificate was obtained, 50 bales were delivered on 7-6-1963 and 50 bales on 24-6-1963. It is the defendant's contention that the Survey Certificate which is Ext. B-1 is totally unrelated to the goods supplied to them either on 7-6-1963 or on 24-6-1963. There is no doubt considerable force in this submission of the learned Counsel for the defendant, but we are not prepared to countenance the same as conferring on them a ground to repudiate the contract. Admittedly, the defendant accepted the first consignment. It was at that time that Ext. B-1 was produced into court by the defendants. The rejection of the second consignment on 24-6-1963 was due to the bad quality of cotton supplied and not on account of the fact that Ext. B-1 certificate did not relate to the price. We need not further deal with this question as we think that the defendant should not be permitted to non-suit the plaintiff on the ground that the essential condition of the contract relating to Survey Certificate was not complied with.

23. The next question is about the date of breach, as that would be relevant to determine the quantum of damages should the plaintiff be entitled to the same. The plaintiff sought to adduce evidence by examining P. Ws. 2 and 3 and filing Exts. A-11 to A-14 as to the prevailing prices in September 1963. As we are of

opinion that the plaintiff did not on his part choose to keep the contract alive, but accepted the repudiation before September, 1963, we need not consider the rates as on those dates. If the plaintiff had accepted the repudiation by the defendant, there was an end of the matter and he could sue. It is not proved that he had kept the contract alive on his part. It is admitted before us by the appellant's counsel that in case it is said that there was a breach by the defendant on 24-6-1963 and that the plaintiff had to claim damages as on that date, he could not recover anything as there was no difference between the contract rate and the market rate. Any way, in the view we have taken, it is not necessary to investigate the question of damages, as the plaintiff, in our opinion, is not entitled to any damages. We are of opinion that it was the plaintiff who had committed breach of the contract, that the defendant did not commit breach of the contract, that the defendant had rightly repudiated the obligations under the contract of 24-6-1963, that the plaintiff has not proved that he had kept the contract alive on his part by either any communication or by tendering the goods and also that he was in a position to perform his part of the contract by proving the existence of 450 bales with him at any time before September, 1963, that Exts. A-1 and A-2 constitute one single contract and were validly repudiated by the defendant in their entirety.

24. In the light of our conclusions above, the appeal fails and is dismissed with costs.