

1909.
June 5.

Present: Mr. Justice Wendt and Mr. Justice Middleton.

A. UNACHALAM CHETTY *et al.* v. SERVICE REEVE & CO.

D. C., Colombo, 25,820.

Jurisdiction—C.I.F. contract sale of goods—Non-delivery of goods—Action for damages—Breach whether within jurisdiction of District Court.

By a c.i.f. contract the defendants, who are merchants domiciled and resident and carrying on business in England, sold certain goods to the plaintiffs, merchants resident and carrying on business in Ceylon. The goods not having been received by the plaintiffs, they sued the defendants in the District Court of Colombo for damages for non-delivery of the goods.

Held, that the District Court of Colombo had no jurisdiction to entertain the action.

*Crozier, Stephens & Co. v. Auerbach*¹ followed.

THE plaintiffs carried on business at Colombo, and the defendants were resident and carried on business in London. The plaintiffs and defendants entered into several contracts for the sale by the defendants to the plaintiffs of certain goods. The terms of the contract were contained in the following indent and contract note:—

“Sirs,—Prepare and ship on our account in part or whole the goods as specified in the indent. For the amount of invoice draw upon me at days’ sight, bill of lading and policy of insurance attached. Such drafts we hereby undertake to accept on presentation and pay on or before maturity. In case any default on our part the shipment or shipments are to be sold for our account, and short proceeds, if any, are to be collected from us. Goods to be insured against all risks from Manchester to Colombo for 15 per cent. over invoice amount.

“Sterling drafts to carry usual bank interest from time of drawing till amount again reaches London. In cases of any claims or disputes arising on the shipments against this indent, such claims or disputes are to be submitted to the survey of two European merchants in the usual way as provided in such cases, the losing side to pay costs of survey. One arbitrator to be appointed by each side. No dispute or claims to be entertained unless made within fifteen days from the landing of the goods. Goods shut out of one steamer may be shipped by the first subsequent steamer available, such subsequent shipment to be ‘good shipment,’ as if shipped by first steamer from which the goods were shut out.

“ Description of goods	.. Sarongs.
“ Quantity	.. Ten cases, each containing 20 corges; size 23 in. by 150 in.

¹ (1908) 77 L. J. K. B. 873.

“ Price and quality and finish	.. As per our sample No. 124, 28 c.i.f. and c., less 3 per cent. commission.	1909. <u>June 8.</u>
“ Assortment	.. In 10 check designs as on our design sheet, guaranteed fast colour.	
“ Headings and folding	.. As per our sample No. 128.	
“ Borders	.. Border must be a little thicker than the quality sample No. 124.	
“ Make up and packing	.. In tin-lined cases 10 pieces assorted to be put in white cardboard boxes and tied with two tapes, each piece to be tied with imitation silk thread on each end as on our sample No. 128.	
“ Shipments	.. In two shipments. First shipment to be here in Colombo in January, 1905, and other in February, 1905.	
“ Remarks	.. All instructions as given in our design sheet.	
“ Folding to measure	.. 8½ by 3½.	
“ Code for the indent	.. Sturmzeit.	

“ *Contract Note No. 58.*

“ Service Reeve & Co. to Messrs. K. R. M. T. T. Arunachalam Chetty & Bros., Colombo.

“ London, November 18, 1904.

“ *Reference Indent No. 5. Confd. Telegram, November 15, 1904.*

“ We have this day sold to you—		
“ Description and quality of goods	Sarongs ; quality and finish as your sample No. 124.	
“ Quantity	.. Ten cases, each containing 20 corges.	
“ Width	.. 23 inches.	
“ Length	.. 150 inches.	
“ Price	.. Thirty shillings per corge c.i.f.c., less 1½ per cent.	
“ Payment	.. By draft as usual.	
“ Shipment	.. In two lots: first, January-February, 1905; second, one month later. Delivery subject to alteration on receipt of your confirmation of cable.	

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“ Remarks

.. In ten check designs as on your design sheet ; colours as fast as your sample. Heading and folding as sample 128. Border a little thicker than quality sample 124. Folding $8\frac{1}{2}$ by $3\frac{1}{2}$. Packing in tin-lined cases. Ten pieces assorted to be put in a white cardboard box and tied with two tapes, each piece tied with imitation silk thread on each end as sample 128.

“ Conditions of sale

Deliveries may be suspended pending any contingencies beyond our control (such as fire, accidents, war, strikes, lock-outs, or the like) causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article.”

The defendants pleaded that the cause of action did not arise in Ceylon, and that the District Court of Colombo had no jurisdiction to entertain the action. The District Judge (J. R. Weinman, Esq.), over-ruled the plea to the jurisdiction, on the ground that the cause of action, to wit, the non-delivery of the goods, arose in Colombo.

The defendants appealed.

Bawa (with him *F. J. de Saram*), for the defendants, appellants.

Sampayo, K.C. (with him *F. M. de Saram, H. A. Jayewardene, and Retnam*), for the plaintiffs, respondents.

Cur. adv. vult.

June 8, 1909. WENDT J.—

I agree that the appeal should be allowed. In order to found jurisdiction the plaintiffs had to show a breach in Colombo of the contracts sued upon. In English cases, therefore, decided under Rule 1 (e) of Order XI. of the Rules of the Supreme Court are in point. According to the Sale of Goods Ordinance the place of delivery was presumably at the seller's place of business, and there is nothing in the contracts stipulating the contrary. Therefore, the breach being non-delivery, the cause of action arose in London, where the seller was to ship the goods. Moreover, this was a c.i.f. contract, and the Court of Appeal in *Crozier, Stephens & Co. v.*

*Auerbach*¹ appear to have regarded the decided cases as establishing that to make the port of destination the place of delivery was inconsistent with the nature of such a contract.

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This was an action by a firm of Chetties carrying on business in Colombo against a firm of merchants carrying on business in London on several causes of action for breach of contract by non-delivery of goods. The defendants pleaded to the jurisdiction of the District Court of Colombo, on the ground that the contract on their part was not to be performed by delivery in Colombo. A preliminary issue was settled thereupon. Has this Court jurisdiction to try this action in Colombo? Upon that issue the District Judge found that the parties intended and contracted that the delivery of the goods should be in Colombo, and that this Court had jurisdiction.

The defendants appealed, and for them it was contended that the cause of action being for non-delivery, the breach did not arise within the jurisdiction under section 9 of the Civil Procedure Code. The contract was to be gathered from the documents D 1 and D 2, being respectively what are called an indent and a contract note. It was admitted on both sides that the contract was what is known in English Mercantile Law as a c.i.f. contract, the terms being that the price paid by the plaintiffs, the buyers, should include commission, insurance, and freight, the sellers to draw on the "buyers at days' sight, and the insurance to include all risks from Manchester to Colombo, and to be for 15 per cent. over invoice amount. Goods shut out of one steamer to be shipped by the first subsequent steamer available. Two shipments to be made, first shipment to be here in Colombo in January, 1905, and the other in February, 1905." The contract note further stated "delivery subject to alteration on receipt of your confirmation of cable. Conditions of sale: delivery may be suspended pending any contingencies beyond our control (such as fire, accidents, war, strikes, lockouts, or the like) causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the articles."

For the appellants counsel relied on sections 18, 28 (1), and (31) of the Sale of Goods Ordinance, No. 11 of 1896, the terms of the indent as to shipment, and contract note as to conditions of sale as showing that delivery meant shipment at the English port, while *Brandt v. Laurence*² and *Bowes v. Shand*,³ *Wancke v. Wingren*,⁴ and especially in reply *Crozier, Stephens & Co. v. Auerbach*,¹ over-ruling *Barrow v. Myers*,⁵ were relied on as showing that shipment at the port of departure was equivalent to delivery of the goods. Counsel

¹ (1908) 77 L. J. K. B. 873.

³ 46 L. J. Q. B. 561.

² 46 L. J. Q. B. 237.

⁴ 58 L. J. Q. B. 519.

⁵ (1888) *Times Law Reports* 441.

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also referred to the *Annual Practice, 1909, page 81*, and Order XI, of 1896, section 28, Rule I.

On the other hand, counsel for the respondents sought to construe the contract as indicating from its terms that delivery was bound to be in Colombo, especially on the ground that the buyer stipulated to pay the freight, and strove to distinguish the cases relied on by counsel for the appellants.

In the present case it was the defendants' duty to ship the goods in England c.i.f., and the plaintiffs' duty to accept the defendants' drafts on presentation and pay them on or before maturity. The alleged breach is non-delivery in Colombo. As to the contract as comprised in D 1 and D 2, after the defendants had insured, paid the freight for and shipped the goods, and posted the invoice, bill of lading and insurance policy attached, to the plaintiffs, their part of the contract would have been performed. The insurance policy being attached to the invoice and sent to the buyer with the bill of lading assuredly contemplated that all risks of transit were the buyer's, and that he was covered by the policy of insurance. Under section 31 (1) of our Sale of Goods Ordinance, *ubi supra*, "where in pursuance of a contract of sale the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier whether named by the buyer or not for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer." Here the goods were to be shipped by no named line of ships, but by some ship as a carrier, and there is nothing to be gathered from the contract, which shows that the statutory position of the parties was modified by agreement in favour of respondents' contention.

I hold therefore that the breach of the contract took place in England, and did not arise within the jurisdiction of the District Court of Colombo. The case, in my opinion, is covered by the decision of the Appeal Court in *Crozier, Stephens & Co. v. Auerbach*,¹ which, as our law is practically the same, seems to conclude the case, and should be followed by this Court. I hold therefore that the decision of the Additional District Judge of Colombo must be reversed, and the action dismissed on the ground of want of jurisdiction with costs in the District Court and of this appeal.

Appeal allowed.

¹ (1908) 77 L. J. K. B. 873.