1952 *Present :* **Gratiaen J. and Gunasekara J.**

S. M. K. ALAWDEEN *et al.*, Appellants, *and* HOLLAND COLOMBO TRADING SOCIETY, LTD., Respondent

S. C. 311—D. C. Colombo, 20,182

Contract—Sale of goods—Repudiation by one party—Termination of contract—C. I. F.—Bill of lading—Requisites of valid tender thereof—Breach of contract—Justification—Plea taken at late stage.

In a contract for the sale of goods, one of the terms was that " any tender or delivery of the goods *or* of the bill of lading *or* of such delivery order or other document or documents as will enable the buyer to obtain possession of the goods shall constitute a valid tender or delivery ". The sellers caused the goods to be placed aboard the ss. " Laurenskerk " at the port of Rotterdam for shipment to Colombo under a contract of affreightment with the owners of that vessel, the terms and conditions of which were set out in a bill of lading which provided *inter alia* that the carriers could, if they thought it necessary, or expedient, arrange for the goods to be transhipped at any stage of the voyage under a fresh contract of affreightment with the subsequent carriers.

The bill of lading was received by the sellers in Colombo in due course and, while the goods were still on board the ss. " Laurenskerk ", the sellers offered to deliver it, duly indorsed, to the buyers upon payment of the price. On 28th February, 1948, the buyers rejected the tender.

Held, that the sellers had made a valid tender in terms of the contract and therefore became entitled to sue the buyers immediately for breach.

The sellers, however, elected to treat the contract as still subsisting. Thereafter an explosion occurred on board the ss. " Laurenskerk " and the goods were transhipped to the ss. " Triport " for oncarriage to Colombo, such transhipment being expressly authorised by the terms of the original bill of lading. On arrival of the ss. " Triport " in Colombo with the goods, the sellers again tendered the original bill of lading and demanded payment of the contract price. The buyers rejected the tender, whereupon the sellers instituted the present action.

Held, that the sellers had no cause of action against the buyers, as the original bill of lading did not give the buyers a right to receive the goods from the actual carrier thereof at the time of the tender.

Further, 1. A valid tender does not always necessitate actual physical production of the document tendered for inspection. 2. A contracting party who gives a wrong reason for an earlier refusal to perform his contracted obligation is not thereby precluded from pleading subsequently a justification which in fact existed, whether he was aware of it or not.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *V. A. Kandiah*, for the defendants appellants.

N. K. Choksy, Q.C., with *S. J. Kadirgamar* and *G. L. L. de Silva*, for the plaintiff respondent.

Cur. adv. vult.

2——J. N. B 24035–1,592 (1/53)

August 18, 1952. GRATIAEN J.—

This is an appeal from a judgment and decree of the District Court of Colombo awarding the plaintiffs a sum of Rs. 13,697·06 as damages against the defendants for breach of contract.

On 5th September, 1947, the defendants placed a written order (P8) with the plaintiffs for a certain quantity of " white shirtings " of a specified description to be imported at the defendants' risk and account upon certain terms and conditions which would regulate the proposed contract. The offer contained in P8 was in due course accepted by the plaintiffs on 25th September, 1947, and in the result there came into existence a binding contract of sale between the plaintiffs (as sellers) and the defendants (as buyers) upon, *inter alia*, the terms and conditions set out in the document P8. The relevant terms and conditions of the contract may be summarised as follows :—

(*a*) the price was fixed on c.i.f. terms—meaning in this context that the price was to cover the cost of the goods, the cost of insurance, and also the cost of the freight payable from the port of shipment to the port of Colombo, but not so as to imply that the contract incorporated in other respects all the well-known features of a c.i.f. contract ;

(*b*) the goods were to bear certain specified marks of identification, and were to be shipped in one lot not later than 31st January, 1948 ;

(*c*) payment was to be " cash against documents ", the meaning of which expression has been explained and qualified in clauses (1) and (4) of P8, namely, that " payment was to be made in cash on or before arrival of the goods ", and that the buyers were " not entitled to call for or await tender (of the goods) before payment "; and that " any tender or delivery of the goods *or* of the bill of lading *or* of such delivery order or other document or documents as will enable the buyers to obtain possession of the goods shall constitute a valid tender or delivery " ; and finally, that "*notwithstanding that the price of the goods may be expressed to be fixed on c.i.f. or equivalent terms*, the buyers shall not be entitled to demand or the sellers bound to tender an insurance policy, bill of lading, delivery order, invoice or other document or documents whatsoever, but *any such tender or delivery as described in Clause 1* shall be a good and valid tender or delivery ". It was further provided that " in the event of the buyers suffering loss recoverable from the insurer, the seller shall be at liberty *either* to deliver to the buyers a policy under which the goods were insured *or* to claim the amount of the loss from the insurer on the buyers' behalf ". In this respect, the terms of the contract differ from those of a c.i.f. contract proper.

Much argument was addressed to us as to whether the contract can more correctly be described as one for the sale of goods *simpliciter* or as a " c.i.f. contract ". To my mind a discussion on those lines would

be of purely academic interest, and the solution of the problem quite unprofitable. The rights of the parties to the contract, and the manner in which they were required to perform their respective obligations under it, are in all respects regulated by the clear and express terms contained in P8. We need not, therefore, look beyond the language of the document itself for the purpose of deciding whether or not, upon a given set of facts, the sellers could be regarded as having discharged their part of the contract so as to entitle them to complain that the buyers had committed a breach of theirs. I would also reject in this connection the argument that, in seeking to interpret P8, we should pay less regard to the clauses appearing in "legible but regrettably small print" than to the type-written words which were added in the concluding parts of the document. The document as a whole has been signed by the defendants, and "in the absence of fraud or misrepresentation, they are bound by every part of it whether they have read it or not". *L'Estrange v. Graucob* [1].

The view I take is that, provided that they had duly shipped the goods in the foreign port within the stipulated period, the plaintiffs could at their option have performed their obligations as to delivery under the contract in one or other of the alternative methods available to them. For instance :—

(*a*) they could have cleared the goods themselves upon their arrival in the port of Colombo, and then made a valid tender of them to the defendants ; in that event they would, without tendering in addition any documents relating to the goods, have been entitled to demand contemporaneous payment of the contract price from the sellers together with landing charges, Customs dues, &c., paid by them but not expressed to be included in the contract price ; *or*

(*b*) they could, after the goods had been shipped at the foreign port in terms of the contract, have made a tender to the defendants *either* of a valid and effectual bill of lading, duly indorsed, *or*, if they so preferred, of any other document entitling the defendants to obtain possession of the goods on their arrival in the port of Colombo *from the particular vessel in which they did arrive ;* upon a valid tender of such bill of lading or other document, the defendants would immediately become liable to pay the contract price and could not postpone payment until the arrival of the goods. In other words, the contract for the sale of the goods could be performed by the sellers, at their option, by the tender or delivery of any document of a kind specified in Clause 1 of the agreement.

On 29th January, 1948, i.e., within the period stipulated in the contract, the plaintiffs did in fact cause the goods to be placed on board the steamer ss. *Laurenskerk* at the port of Rotterdam for shipment to Colombo under a contract of affreightment with the owners of that vessel the terms and conditions of which are set out in the bill of lading P19. All the terms of this bill of lading do not appear in the type-written brief

[1] *(1934) 2 K. B. 394.*

supplied to us under the Civil Appellate Rules, but I observe from the judgment under appeal that they provide *inter alia* that " the cargo or any part thereof may at the option of the carrier and as often as may from any cause be deemed expedient be carried in a substituted ship or lightered and/or landed and/or stored for the purpose of oncarriage in the same or other ship or by any other means of conveyance ". This clause authorises the original carriers, if they thought it necessary or expedient, to arrange for the goods to be transhipped at any stage of the voyage under a fresh contract of affreightment whereby the subsequent carriers would undertake to convey the goods to their ultimate destination for delivery to their owners.

The bill of lading, P19, was received by the plaintiffs in Colombo in due course, and on 26th February, 1948, they wrote the letter P16 to the defendants in the following terms :—

" Dear Sirs,

Indent No. HCTS/85

300 pcs White Shirtings (Dutch)

Referring to our letter of the 13th instant, we have received the documents relating to the above shipment from our London Office with instructions to present them to you for payment.

We are forwarding you herewith our Invoice No. 13096 for Rs. 25,742·72 covering this shipment and shall be thankful to have your cheque by return to enable us to hand you the necessary documents.

The carrying steamer, we gather from the local Agents, is expected here on or about the 28th instant."

The defendants replied by P17 dated 28th February, 1948, refusing payment on a ground of objection which, having regard to the terms of the contract, was quite insupportable. The goods were at that time still on board ss. *Laurenskerk*, and the plaintiffs' offer to deliver the bill of lading P19, duly indorsed, to the defendants upon payment of the price constituted at that time a valid tender within the meaning of the contract. It follows that the defendants by refusing payment had wrongfully repudiated the contract and incurred an immediate liability, at the option of the plaintiffs, to be sued for damages arising from its breach.

It is clear, however, from the oral evidence and from the subsequent correspondence between the parties that the plaintiffs elected not to treat the contract as immediately discharged, but preferred instead, as they were certainly entitled to do, to regard it as still subsisting. The consequences of their exercising this option have been authoritatively explained by the House of Lords in *Heynam v. Darwins Ltd.* [1] where Lord Simon cited with approval at page 361 the following *dictum* of Scrutton L.J. in an earlier case :—

" (The innocent party) may, notwithstanding the so-called repudiation (by the other party) insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In

[1] (*1942*) *A. C. 356.*

that event, the co-contractor has the opportunity of withdrawing from his false position and, even if he does not, may escape ultimate liability because of some supervening event not due to his own fault . . ."

As Lord Simon points out, " repudiation by one party does not terminate a contract—it takes two to end it, by repudiation on the one side, and acceptance of the repudiation on the other ". In the present case, the defendants purported to base their original repudiation of the contract upon the pretext that the date stipulated for the shipment of the goods in Rotterdam was in truth the final date fixed for their arrival in Colombo. Nevertheless, the plaintiffs " chose to keep the contract alive for the benefit of the other party as well as their own; they therefore remained subject to all their own obligations and liabilities under it, and enabled the other party not only to complete the contract, if so advised, notwithstanding their previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it ". *Frost v. Knight*[1]. In the result, the plaintiffs are precluded from now maintaining a cause of action based merely on the defendants' original refusal to accept the tender of P19 on 28th February, 1948. In the words of their chief witness, Mr. J. A. Perera, " the matter was still in abeyance ". A fresh and valid tender of performance by the plaintiffs therefore became necessary before the defendants could be made liable for the consequences of a repetition of the earlier breach of contract on their part.

These observations apply with equal force to the subsequent unsuccessful attempts made by the plaintiffs, *during the period when the goods were still on board ss. Laurenskerk*, to persuade the defendants to accept delivery of the bill of lading P19. On each occasion, notwithstanding the defendants' wrongful breach of the contract, the plaintiffs elected to treat the contract as being still in operation.

In due course, an event occurred which neither party had anticipated. According to the plaintiffs' version, an explosion occurred on board ss. *Laurenskerk* shortly after that steamer left the port of Genoa. In consequence, the vessel returned to Genoa instead of completing her voyage to Colombo, and the goods which formed the subject-matter of the contract of sale were then transhipped to another steamer, ss. *Triport*, for oncarriage to the port of Colombo. Such transhipment was admittedly authorised by the contract of affreightment contained in the original bill of lading P19, but no evidence was led at the trial as to the nature of the terms arranged between the owners of the respective vessels in respect of the subsequent carriage of the goods from Genoa to Colombo. Mr. Choksy has not drawn our attention to any oral evidence or to any clause in any document from which we can obtain enlightenment on this point.

The oncarrying steamer ss. *Triport* arrived in Colombo according to the evidence, about the end of March or the beginning of April, 1948.

[1] *(1872) L. R. 7 Exch. 111 at p. 112.*

On 3rd April, 1948, the fact of the transhipment was for the first time notified to the defendants in a letter addressed to them by the plaintiffs in the following terms:—

" Dear Sirs,

Indent No. HCTS/85

Further to our letter of the 9th ultimo, we write to advise that the 6 bales of White Shirtings shipped by ss. " Laurenskerk " against your above indent have arrived, transhipped by the ss. " Triport " which steamer is in harbour.

Please let us have your remittance by return for the amount of our bill so that we may hand over documents to you without further delay. "

No reply to this letter was received, but the witness J. A. Perera explains that he had a personal interview on the subject with a member of the defendants' firm. The substance of what took place on that occasion is contained in the plaintiffs' letter P13 dated 12th April, 1948, addressed to the defendants:—

" Dear Sirs,

Indent No. HCTS/85

6 Bales White Shirtings ex ss. " Triport "

We refer to our interview in connection with the above and note that you are expecting your Proprietor, who is stated to be arriving from India very shortly, and that you would arrange for taking up the documents on the arrival of this gentleman.

Meantime we would point out that the goods which are lying at your risk at wharf are already on rent, and we shall be thankful to know the definite date when your Proprietor in India is expected to arrive."

The defendants failed, however, to comply either with the request for payment or with the demand for acceptance of the bill of lading P19, *which was admittedly the only document, apart from the invoice, which the plaintiffs purported to tender at this stage.* Indeed, it is quite evident that the defendants had now become anxious to avoid payment on any pretext which they could think of or invent, the reason being that the value of the goods in the local market had depreciated considerably since the date of the formation of the contract. In the meantime, the goods were landed at the Customs warehouse and were, in due course, caused by the plaintiffs to be sold by public auction with notice to the defendants and " at their risk ". Thereafter, the plaintiffs instituted the present action claiming Rs. 13,697·06 from the defendants as damages for alleged breach of contract. Assuming that a cause of action did arise upon the facts proved at the trial, there is no dispute as to the quantum of damages claimed by the plaintiffs. The only question for

our consideration is whether the learned trial Judge has correctly decided that, upon the evidence led before him, the defendants are liable in law to pay this amount.

The defendants raised a number of special defences to the maintainability of the action. All of them were rejected by the learned Judge and none were pressed before us in appeal. We are therefore now concerned with only one outstanding issue, raised in somewhat general terms but nevertheless sufficient in form to cover the main objection raised in Mr. H. V. Perera's argument. His contention was that the plaintiffs have not proved due performance by them of their contractual obligations as to tender or delivery, *on or after 3rd April, 1948*, so as to entitle them to sue the defendants for damages for breach of contract.

The real question for determination is whether, after the plaintiffs had refused to accept the defendants' repudiations of the contract on the earlier occasions, they had ultimately, in the light of the events which were known by both parties to have supervened, made a valid tender in terms of Clauses 1 and 4 of P8 in consequence of which tender the defendants became obliged under the contract to pay the contract price. If that question be answered in favour of the plaintiffs, the judgment under appeal must clearly be affirmed.

I have already pointed out that the rejection of the tenders of the bill of lading P19 before the goods were transhipped from ss. *Laurenskerk* cannot now, in view of the plaintiffs' decision not to accept those earlier repudiations as finally terminating the contract, be relied on as giving rise to a cause of action against the defendants. Similarly, the plaintiffs did not choose (as they might well have done in view of other provisions of the contract) to make a valid tender *of the goods themselves* after they had been discharged from the vessel. In the result, the question for our decision is whether the plaintiffs' offer on or about 3rd April, 1948, to deliver the original bill of lading P19 after the time of the arrival of ss. *Triport* in the port of Colombo, constituted a valid tender under the contract of sale.

It is unfortunate, perhaps, that the implications of this fundamental issue were somewhat clouded at the trial by the importance which the parties had attached at that stage of the proceedings to certain other points of contest.

I propose at this stage to dispose of certain preliminary submissions which were made before us in connection with this outstanding issue. For instance :—

(*a*) it was argued on behalf of the defendants that the tender of the bill of lading P19 after ss. *Triport* arrived in Colombo was in any event invalid and ineffectual because it was not physically produced for the defendants' inspection at the time of the so-called tender. I reject this objection. It is no doubt true that a valid tender, whether it be of goods or of a document such as a bill of lading, generally requires

that the other party should be afforded " a reasonable opportunity of examining the thing tendered so as to ascertain that it really is what it purports to be". *Startup v. Macdonald* [1]. But in the present case P19 had on at least one previous occasion been made available to the defendants for their inspection, and I think that it may fairly be said that, if the tender did in other respects constitute the tender of a valid document under the contract, its physical production on the final occasion had been dispensed with. In the particular circumstances attending the defendants' failure or refusal to accept the offer of P19 as a valid tender under the contract, the bare physical production of the document would in truth have made not the slightest difference to their course of conduct. There is no reason to doubt that, if payment of the price had been made contemporaneously by the defendants, the bill of lading P19, duly indorsed, would have been made available to them for what it was worth ;

(*b*) it was argued *per contra* on behalf of the plaintiffs that the rejection of P19 on grounds which were manifestly without foundation precludes the defendants from subsequently supporting its rejection on any other valid ground, and that therefore the defendants cannot now contend that the tender of P19, at the time when it was made in April, 1948, was not a valid tender under the contract. In my opinion this argument is also without substance. " It is a long established rule of law that a contracting party who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not. " *Taylor v. Oakes* [2]. In other words, the previous attitude of the defendants, however insupportable, does not prevent them from denying at this stage that, if they had accepted the document when it was tendered to them in April, 1948, they would in truth have received an effective document which they had bargained to accept in exchange for the contract price. " Why they really refused the document does not matter, nor does the case turn on the particular objection put forward by them at the time. " *Hansonn v. Hamel and Horley* [3].

I now proceed to examine the question whether the evidence in the case is sufficient to establish the validity of the tender of the bill of lading P19 in April, 1948, to the defendant after ss. *Triport* had arrived with the goods in the port of Colombo. The plaintiffs were certainly entitled under the contract to discharge their obligation as to delivery by tendering, instead of the goods, a bill of lading valid and effective at the relevant date. The selection of this particular alternative mode of delivery had the effect of equating the contract in certain respects to a c.i.f. contract.

[1] *6 Man. and G. 593 = 134 E. R. 1029 at p. 1036.*
[2] *(1922) 38 T. L. R. 349 at p. 351 and 38 T. L. R. 517 C. A.*
[3] *(1922) 2 A. C. 36.*

Delivery of a valid bill of lading, duly endorsed, passes title in the goods to the purchasers and operates as " a symbolical delivery of the goods themselves ". In order truly to perform a c.i.f. contract or of any other contract under which the tender of a bill of lading operates as the equivalent of a tender or delivery of the goods themselves, " the seller has to deliver documents by virtue of which the buyers may, if the goods are in existence, obtain delivery of them, and by virtue of which, if the shipowner has not fulfilled his obligation imposed by the contract of affreightment, he, the buyer, may have such remedies as the contract of affreightment may give him ". *per* Warrington L.J. in *Arnhold Karbeck v. Blythe* [1]. As Bankes L.J. said in *Hansson v. Hamel and Horley Ltd.* [2] the validity of the tender of a bill of lading " depends upon whether it gives the buyer two rights (*a*) the right to receive the goods and (*b*) a right against the shipowner who carries the goods should the goods be damaged or not delivered ".

The bill of lading P19 sets out the terms of the contract of affreightment under which the goods were placed on board ss. *Laurenskerk* for shipment from Rotterdam to Colombo. It seems to me, therefore, that its tender, after the goods had, to the plaintiffs knowledge, been transhipped at Genoa into the steamer ss. *Triport*, would *prima facie* be invalid unless both the tests laid down in the decisions referred to were proved by the party relying on the tender to have been satisfied. No doubt the transhipment was authorised by the terms of the contract of carriage with the owner of ss. *Laurenskerk*, but on the face of the document there is nothing to indicate that the bare production of P19, unaccompanied by some other document, would furnish evidence of a binding obligation on the owner or the master of ss. *Triport* to release the goods to the assignee of a bill of lading issued by the owners of a different vessel. No evidence has been led by the plaintiffs from which the Court can justifiably infer that the defendants, by accepting the tender of P19 alone could have obtained as of right the delivery of the goods which they were under contract to purchase, and which, upon payment of the contract price, they were entitled to receive if available on board the oncarrying steamer. Mr. Choksy has suggested that the custom of the port and the usage and practice of the local Customs authorities introduce different considerations in the port of Colombo. I am content to state that we have not been referred in this case to any evidence of such a custom or usage.

" The documents tendered must be valid and effective at the time of the tender " [3], and the plaintiffs have failed to establish at the trial or in the course of the argument before us, either by reference to the terms of P19 or by any other evidence which might have been admissible for the purpose, that the bill of lading P19 after the goods were known to have been transhipped to ss. *Triport*, was at the relevant date an " effective shipping document " sufficient to transfer to a purchaser of the goods all the rights and benefits to which he should have been entitled on payment of the contract price. As I have pointed out,

[1] *(1916) 1 K. B. 495 at p. 514.* [2] *(1922) 91 L. J. K. B. 65.*

[3] *Kennedy on C. I. F. Contracts (2nd ed.) at page 115.*

there is no evidence as to the terms of the fresh contract for the oncarriage of the goods in ss. *Triport* from Genoa to Colombo which were procured at Genoa by the owners of ss. *Laurenskerk* in the exercise of the right of transhipment reserved to them under the bill of lading P19. It has not been proved that the owners of ss. *Triport* had, for the purposes of the final voyage, become parties, by addition or substitution, to the original contract of affreightment. There is certainly no endorsement on the document to this effect—here again I am guided by the copy furnished in the type-written brief—and the plaintiffs did not tender to the defendants any other document by which enforceable rights against ss. *Triport* would have passed to them as the purchasers of the goods on board that vessel. I would hold, therefore, that the plaintiffs have not discharged the burden of proving that they had duly performed their part of the contract, and in the result the cause of action pleaded against the defendant has not been established.

Mr. Choksy has pointed out that the plaintiffs, at any rate, seem to have encountered no difficulty in obtaining delivery of the goods. This may well be so, but there is no proof before us that the goods were obtained by the production of the original bill of lading P19 alone. *Prima facie*, P19 did not, after the transhipment took place at Genoa, operate as a shipping document entitling the owner to claim delivery of the goods from the oncarrying vessel. I cannot subscribe to the proposition that, in a case such as this, the holder of a bill of lading, purchased for valuable consideration, should be satisfied with only such remedies as he may possess against a carrier other than the carrier who was known at the time to have brought the goods to their final destination. In my opinion the defendants would have been left with " a considerable lacuna in the documentary cover to which the contract entitled them " [1].

I have given careful consideration to the question whether justice requires that we should send the case back for a retrial so as to enable the plaintiffs to lead further evidence, if available, on the specific issue as to whether the tender of P19 after the date on which the goods were known by both parties to have been transhipped from the original carrying steamer, constituted a valid tender in April, 1948, under the contract P8. It seems to me that the plaintiffs cannot justifiably claim such an indulgence at this stage. They had originally based their cause of action in the plaint on an alleged failure of the defendants to accept a tender *of the goods themselves*, and it was not suggested either at the trial or in the course of the appeal that there had been a valid tender in that respect. When that particular averment was denied, the plaintiffs were permitted by the learned trial Judge, in his discretion, to raise an issue in which they supplemented the cause of action pleaded in the plaint by relying in the alternative on an alleged breach by the defendants of their obligation to pay cash " against documents ". That issue necessarily involved an acceptance by the plaintiffs of the burden of proving a valid tender of the document or documents which, in their submission, had been wrongfully rejected by the defendants.

[1] *(1922) 2 A. C 36.*

It would not be fair to give them yet another opportunity of supplying the deficiencies in the proof of the cause of action on which they finally relied.

For the reasons which I have given, I would set aside the judgment under appeal and dismiss the plaintiffs' action with costs both here and in the Court below.

GUNASEKARA J.—I agree.

Appeal allowed.