APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ., and on difference between them before U Thein Maung, Chief Justice.

D. K. PAREKH (APPELLANT)

v.

THE BURMA SUGAR COMPANY, LIMITED (RESPONDENT).*

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Feb. 19.

Contract—Whether completed—Formal contract in writing contemplated—Whether a condition precedent—Rules guiding determination—Deposit—Whether benefit given or received under contract—Contract Act, s. 64—Forfeiture of deposit—Terms and conditions for—S. 28 of Union Judiciary Act—S. 98 of the Code of Civil Procedure.

Appellant deposited on 25th November 1941 a sum of Rs. 3,750 being half the value of 750 tons of molasses at Rs. 10 a ton to be supplied during 1941-42 season and got a receipt. In the previous season, a similar receipt was followed by a written contract fixing, *inter alia*, terms and conditions of delivery. The appellant sued for recovery of the deposit, claiming (1) that there was no completed contract, (*a*) as the terms regarding delivery had not been fixed and (*b*) that the parties contemplated a written contract as a condition precedent and (2) the amount of deposit, 50 per cent of the total, could not be forfeited without proof of actual damage as it amounted to a penalty.

As regards the second point U Tun Byu and U Aung Tha Gyaw, JJ., agreed and *Held*: A deposit is not a benefit given or received under the contract and a stipulation for forfeiture in case of default is not by way of penalty.

Natesa Aiyar v. *Appavu Padayachi*, 38 Mad. 178, referred to.

For the buyer to recover deposit, it must be shown that seller was in default.

Mohamed Habibbula v. *Mohamed Shafi*, 41 All. 324; *Gowal Das Sidany* v. *Luchmi Chand Jhawar*, 57 Cal. 107; *Piari Lal and others* v. *Mina Mal Bal Kishan Das*, 50 All 82, relied on and applied.

Muralidhar Chatterji v. *International Film Company, Limited*, I.L.R. (1943) 2 Cal. 213 (P.C.), distinguished.

Per Chief Justice: Terms of the proviso to s. 28 of the Union Judiciary Act are wider than that of s. 98 of the Code of Civil Procedure under which only difference on a point of law can be referred to a 3rd Judge but under the Union Judiciary Act not only points of law but also other points can be referred.

* Special Civil 1st Appeal No. 67 of 1947 against the decree of Chief Judge, Rangoon City Civil Court, in Civil Regular No. 1803 of 1947, dated the 24th September 1947.

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As regards the first point two learned Judges differed and the matter was referred to the Chief Justice who, agreeing with U Aung Tha Gyaw, J., *Held:* That the terms as to time and mode of delivery could hardly be of importance when the parties had the whole season before them and delivery could be made according to their convenience and the parties did not consider it so important.

It is a question of construction whether execution of a contract is a condition or term of the bargain or a mere expression of the desire of the parties as to the manner in which the transaction already agreed will go through.

Shankarlal Narayandas Mundade v. *New Mofussil Company, Limited (In Liquidation)*, 73 I.A. 98 at p. 107; *Harichand Mancharam* v. *Govind Luxman Gokhale*, 50 I.A. 25, relied on.

K. R. Venkatram for the appellant.

Horrocks for the respondents.

U AUNG THA GYAW, J.—This appeal arises out of a suit brought in the City Civil Court of Rangoon by the appellant for recovery of Rs. 3,750 deposited by him with the respondents as security for fulfilment of a contract for the purchase of 750 tons of molasses. This deposit was made on the 25th November 1941 under a receipt made out in terms set out in Exhibit A. The appellant made this claim on the plea that owing to the war, a regular contract was not signed between him and the respondents; nor was any supply of molasses made to him. The respondents contended that the parties did enter into a contract on or about the 25th November 1941 for the supply of 750 tons of molasses during the season 1941-42 at the price of Rs. 7,500, but that no supply was made owing to the appellant's failure to take delivery in breach of the said contract. In their reply the plaintiff-appellant contended that a formal contract was contemplated and agreed upon to be executed between the parties embodying the terms as specified in the previous year's contract, Exhibit C and that since delivery orders were never forwarded by the defendant-respondents as provided

for in the said formal contract, there was no breach on his part.

The suit went to hearing on the issues as to whether there was a concluded contract between the parties and, if so, what its nature was, and whether the plaintiff-appellant had committed a breach of the same.

The learned Chief Judge of the Rangoon City Civil Court found these issues against the plaintiff-appellant and dismissed his suit. The correctness of this decision is now disputed by the appellant on the grounds that the execution of a formal document was part of the contract, and that all the material terms of the said contract had not been settled or arranged between the parties ; that these terms were essential to the making of the contract and that they could not be found in the terms of the deposit receipt, Exhibit A. The appellant has further contended that the security deposit could not be forfeited without proof of the actual damage suffered by the respondents.

The deposit receipt, Exhibit A, was made out in these terms :

" Received from Mr. D. K. Parekh rupees three thousand seven hundred and fifty only on account of cost of 375 tons molasses at Rs. 10 per ton deposited with us as security for fulfilment of contract for 750 tons molasses for season 1941-42."

The amount deposited represented half of the total purchase price as did the deposit made in the previous year under the deposit receipt, Exhibit B, under which the sum of Rs. 2,700 was deposited against fifty per cent of the value of molasses contracted to be sold to the appellant for season 1939-40, at Rs. 9 per ton. The terms of Exhibit A went further than those of Exhibit B in that mention is made of the fact that the deposit was effected as security for fulfilment of contract for 750 tons of molasses.

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It is the case for the respondents that the parties had entered into a complete contract when the deposit in suit was made by the appellant; the quantity contracted to be sold together with the rates per ton and the season during which the supply was to be made being all clearly stated in the deposit receipt. In the previous year deposit was made in February, and delivery was agreed to be made in the months of February, March and April, the remaining months of the molasses season. The deposit in suit was made in the month of November giving the parties five months to arrange for the making and acceptance of the monthly deliveries that would follow the making of the contract.

The question which then arises is whether this arrangement of the deliveries that were to be made under the contract can be considered to be so essential and material that it would have required further negotiation and settlement between the parties. That this could not be so might be judged from the terms of clause (5) of the previous year's contract set out in Exhibit C. This clause lays down the number of instalments in which deliveries were to be made and the manner in which the prices were to be paid therefor both by payment in cash and by appropriation of the money in deposit.

Now, the appellant in his evidence admits that, when the deposit was made in 1941, he took it that the terms of the contract would be more or less similar to those of the previous year, except perhaps, as regards delivery and that the deposit he had made was intended to be utilized in the same manner as was done in respect of the deposit made in the previous year. Since this mode of utilizing the deposit money in the previous year was inseparably bound up with the manner in which deliveries were to be made in

fulfilment of the contract, as shown in clause (5) in Exhibit C, there is strong reason to think that the terms of the contract relating to these matters had already been settled before the deposit in suit was actually made.

When explaining the making of the deposit on the 25th November 1941, the plaintiff-appellant made the further explanation that the understanding at the time was that a "formal" contract was to be drawn up later containing the terms of the contract, but that this could not be done as one Mr. Happel, the defendants' Manager, was busy elsewhere. The plaintiff-appellant was in Rangoon until February 1942 carrying on his business as usual and the admitted fact that he took no further steps in connection with his molasses deal with the respondent Company would seem to give rise to the inference that he regarded the said deal as closed, and the absence of a formal contract, as was drawn up in the previous year, was not a matter of any great concern to him. Thus both the language contained in the deposit receipt and the conduct of the appellant support the respondents' contention that at the time the deposit of half the purchase price was made, there already existed between the parties a concluded contract in regard to the purchase and supply of molasses, and that the formal contract which has been insistently pleaded on behalf of the appellant, was to be a mere formal expression of what had previously been agreed upon by the parties. In fact, the question of delivery or deliveries that were to be made would hardly be a matter of importance when the parties had the whole of the molasses season before them during which such deliveries could be made according to their convenience. The matter of giving and taking delivery as shown in clause 5 of Exhibit C was intertwined with that of the appropriation of the deposit and must in

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all probability have been discussed and settled before the deposit was made.

The case of *A. V. & Son and another* v. *Akoojee Jadwet & Co.* (1) dealt with entirely different sets of facts and is of no help to the appellant's contention that, when he made the deposit in terms set out in the receipt, Exhibit A, the contract between him and the respondents had not proceeded beyond the stage of mere negotiation. The decision in the case of *W. J. Rossiter, George Curtis and others* v. *Daniel Miller* (2), referred to in the judgment of the lower Court, is more to the point and is to this effect—that even if the parties had expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, this fact by itself would not show that they continue merely in negotiation. Thus, having regard to the terms of the deposit receipt, Exhibit A, and the formal agreement, Exhibit C, executed between the parties in the previous year and to the ordinary and probable course of business conduct, it would appear that the learned Judge of the City Civil Court was right in arriving at the conclusion that there was a concluded contract between the parties in this case.

On the question of the breach of this contract the learned Judge of the City Civil Court appears to have based his decision on the admissions made by the plaintiff-appellant himself in his evidence to the effect that in view of the circumstances arising out of the war, he was not prepared to sign a formal contract on the lines of Exhibit C, if one were presented to him and that in fact, beyond making some ineffectual attempts to contact the respondent, he took no step whatever to fulfil the terms of the contract he had already entered into with the latter. The defendant Company were

(1) (1946) R.L.R. 31. (2) (1879) 3 A.C. 1124.

producing molasses right up to 1942; thus showing that they were in a position to fulfil their part of the contract. The initiative, in the circumstances, thus rested with the plaintiff-appellant and since, on his admission, he had made no effort to ask for delivery, he was rightly held to have committed the breach. *See* also section 35, Sale of Goods Act.

On the next question as to what is to happen to the deposit made by the plaintiff-appellant, it has been put forward on his behalf that the respondents are not entitled to forfeit the sum on the score of the appellant's breach of the terms of his contract; that any clause as to forfeiture should be regarded as in the nature of a penalty and must attract the application of section 74 of the Contract Act.

The deposit receipt which the appellant had signed states that the money was paid as security for the fulfilment of the contract. The formal contract executed between the parties in the previous year also set out in clause (10) that the deposit was to be forfeited in the event of any breach on the appellant's part.

That a deposit is not a benefit given or received under the contract was pointed out in the case of *Natesa Aiyar* v. *Appavu Padayachi* (1), and it was further held that a stipulation for the forfeiture of the deposit in case of breach is not one by way of penalty.

In *Mohamed Habibbula* v. *Mohamed Shafi* (2), it was held that where the plaintiff had advanced money to the defendant by way of earnest money and as a guarantee for the fulfilment of the contract in respect of which he is suing, he cannot recover the earnest money where it is found that the breach of the contract was due to his own default.

A similar deposit, but made by an auction purchaser at a Court auction sale, was held to have been

(1) 38 Mad. 178. (2) 41 All. 324.

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forfeited to the decree-holder in the case of *Gowal Das Sidany* v. *Luchmi Chand Jhawar* (1).

For the buyer to be entitled to the recovery of the deposit made by him, it must be shown that the seller was in default and was unable to carry out his part of the contract, see *Piari Lal and others* v. *Mina Mal Bal Kishan Das* (2).

This being the state of the law on the question raised on the appellant's behalf, it is clear that he is not in this case entitled to the refund of the deposit made by him. His suit was rightly dismissed and his appeal must, accordingly, be dismissed with costs.

However, as my learned brother and I have disagreed on the question of the existence of a concluded contract between the parties and have accordingly arrived at different conclusions as to the merits of the appeal, I respectfully concur with him in making a reference to another Judge on the point of law stated by him.

U TUN BYU, J.—A contract was entered into between the plaintiff, who is the appellant in this appeal, and the defendant, who is the respondent, for the supply of 600 tons of molasses in respect of the 1939-40 crushing season. This contract was reduced into writing, namely, Exhibit C, where the terms of the contract are fully set out. The dispute, which had arisen, is in respect of the 1941-42 season.

Exhibit A shows that on the 25th November 1941 the plaintiff paid a sum of Rs. 3,750 to the defendant "on account of costs of 375 tons of molasses at Rs. 10 per ton", which sum was said to be deposited "as security for fulfilment" of the contract for the supply of 750 tons of molasses for the season 1941-42. No

(1) 57 Cal 107. (2) 50 All 82.

molasses were in fact supplied or taken in respect of the season 1941-42.

The first point which falls to be determined is whether there was a complete contract for the supply of 750 tons of molasses in respect of the season 1941-42 between the plaintiff and the defendant.

The plaintiff's contention, as urged by his advocate, is that it was contemplated by the parties that there was to be a written agreement, and that it was a condition precedent that there should be a written agreement, and as no written agreement was executed, there was no concluded contract between the plaintiff and the defendant. It was also contended on behalf of the plaintiff that in any case there was no complete contract arrived at in respect of the contract for the supply of 750 tons of molasses for the season 1941-42, and the plaintiff is accordingly entitled to the refund of the Rs. 3,750 paid to the defendant as indicated in Exhibit A.

The plaintiff had to make a similar deposit in respect of the previous-year contract, the receipt of which was filed as Exhibit B, dated the 5th February 1940. The wording in Exhibit B is not quite the same as in Exhibit A, but it was apparently intended for the same purpose as in Exhibit A.

Exhibit A, which, from the point of view of the defendant, is very important, is as follows :

"Received from Mr. D. K. Parekh Rupees three thousand seven hundred and fifty only on account of cost of 375 tons molasses at Rs. 10 per ton deposited with us as security for fulfilment of contract for 750 tons molasses for season 1941-42."

It is contended on behalf of the defendant that Exhibit A shows that there was a complete contract between the parties, and that, so far as the delivery was concerned, it could be implied that the delivery

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would be made in reasonable instalments, and it could accordingly be said that there was a complete contract between the plaintiff and the defendant. The payment of the deposit does not appear to be very significant when it is borne in mind that there had been a contract in writing between the parties for the previous season. The plaintiff would naturally anticipate that all the requisite terms of the contract for 1941-42 season could be amicably arranged after the deposit was paid, and before a formal contract was executed.

The plaintiff in his examination stated :

"On 25th November 1941 I made a deposit with the defendant of Rs. 3,750. The understanding was that a formal contract was to be drawn up later containing the terms of the contract. Exhibit A is the receipt granted to me by the defendant. It is not correct that on the date of this receipt there was a regular contract between us. Formal contract was not drawn up because Mr. Happel '(meaning, apparently, Mr. Hepburn)' was busy as a Juror in the High Court. Twice or thrice I went to the defendant but could not find him, and in December war broke out, and I went to the defendant's office two or three times but could not find Mr. Happel. I was told that Mr. Happel was in Sahmaw. After the receipt I heard nothing whatever from the defendant's company. I left Rangoon in the week (*sic*) of February 1942. I came back to Rangoon in 1946."

And on cross-examination he also stated :

"When the deposit receipt was given the price and the quantity are agreed. But a formal contract is to be drawn up later. When the deposit was made in 1941 I took it that the terms of the contract would be more or less similar to those of the previous year except perhaps as regards delivery. * * * * If there was a contract in 1941 my intention as regards Exhibit A deposit was the same."

Mr. Hepburn, who apparently negotiated the contract with the plaintiff in respect of the supply

of molasses for the 1941-42 season, was said to be present in Burma when the suit which gave rise to this appeal was filed, and it appears that he subsequently left Burma. In the absence of any evidence by Mr. Hepburn as to what actually took place at or about the time when the deposit of Rs. 3,750 was paid by the plaintiff, it seems to me that the Court will have to accept the statement of the plaintiff that when he paid Rs. 3,750, the arrangement about the dates of the delivery and the quantity of molasses to be delivered at each delivery had not been definitely arrived at. In any case, no evidence had been given on behalf of the defendant that any definite arrangement had been arrived at about the dates of the delivery of the molasses or the quantity which was required to be delivered at each delivery. The only person who could have given evidence on behalf of the plaintiff on this point was Mr. Hepburn, and he was not examined before he left Burma.

It is clear that an agreement, to be binding on the parties, must be in the nature of a complete agreement, and Lord Blackburn's observation on this matter appears to me to be explicit and appropriate, in considering the point at present under consideration, and it was made in the case of *W. J. Rossiter, George Curtis and others* v. *Daniel Miller* (1):

"I quite agree with the Lords Justices that (wholly independent of the Statute of Frauds) it is a necessary part of the Plaintiff's case to show that the two parties had come to a final and complete agreement, for, if not, there was no contract. So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in

(1) (1877-8) 3 A.C .1124 at p. 1151.

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negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, shew that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

The first point for consideration is, therefore, whether there was a concluded contract between the plaintiff and the defendant in this case. No agreement had been arrived at between the parties as to the dates on which deliveries could be expected, and also in respect of the quantity of molasses, which was to be supplied at these deliveries, in so far as the 1941-42 season was concerned. It has accordingly to be considered whether these particulars can be considered to be essential or material particulars of the contract for the supply of molasses for the season 1941-42, and, if the answer is in the positive, it is clear, then, that there was no complete contract between the plaintiff and the defendant in respect of the supply of molasses for 1941-42.

It is contended on behalf of the defendant that the parties could be said to have intended that the deliveries should be made in reasonable time and that the molasses should be delivered in reasonable instalments. It appears to be clear, however, that without fixing the dates of and the quantity to be made at each delivery, the plaintiff would not be able to claim delivery of any specified quantity which might be required by him or to claim that the deliveries should be made by certain specific dates. The suggestion that the parties had five months, after the deposit was

paid, within which they could arrange for the delivery cannot get over the fact that in the absence of a definite arrangement, the plaintiff would not be able to enforce delivery by any specified date, and in any specified quantity. It must also be remembered that the contract was in writing in the previous year, and there cannot be any doubt that the parties intended that the contract for the year in dispute was also to be in writing; and if it was to be in writing, it is reasonable to conclude that the parties intended, after the deposit of Rs. 3,750 was paid, to arrive at an agreement about the dates of the delivery and the quantity to be made at each delivery. It would, if the suggestion made on behalf of the defendant is accepted, in effect mean that the plaintiff would have to accept the delivery at such time and in such quantity as the defendant might think reasonable. The word "reasonable" is elastic, and it might even justify a delivery made a month or more later than what the plaintiff might have expected, and in that way it could have led to financial loss, so far as the plaintiff's business is concerned. It does not require much foresight to observe that such a state of affairs was not likely to prove beneficial to the plaintiff's business. The plaintiff would not in that case be able to make any advanced contract of sale with any certainty as respect the date of delivery and the quantity of each delivery for the molasses to be received from the defendant for the season 1941-42, as he could not be certain of the date on which any delivery of the molasses could be expected from the defendant, or in what exact quantity. The date and quantity of delivery must accordingly be considered to be a matter of importance to a business man, especially when the quantity to be purchased is as much as 750 tons.

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As regards the contention made on behalf of the defendant that it could be implied that the molasses would be delivered in reasonable instalments, there is nothing in the evidence to indicate in how many instalments the molasses are to be delivered. The quantity required for the season 1941-42 was not the same as in the previous season. Who is to determine as to what would amount to reasonable instalments or whether the instalments were to be all in equal instalments or in varied instalments? It might be mentioned that the deposit of Rs. 3,750 was paid in the month of November, whereas the deposit in respect of the previous season was paid only in the month of February. The plaintiff, as a business man, would certainly have preferred to have the quantity and time of the delivery of each instalment to be made in accordance with his business requirement. It does not necessarily follow that because certain dates had been fixed for the previous contract that those dates would also be suitable for the plaintiff's business of the subsequent season.

It would not be correct to assume that the dates of delivery and the quantity to be supplied at each delivery had been discussed between the plaintiff and Mr. Hepburn or any person on behalf of the defendant in the absence of evidence or to even suggest that discussion on these points must have taken place. Apparently no attempt was made by the defendant to have Mr. Hepburn, who apparently negotiated the contract for the sale of 750 tons of molasses with the plaintiff, examined before he left Burma. On the evidence on the record it is not possible to determine with any certainty the quantity of molasses which is to be supplied at each instalment or the date by which each instalment is to be delivered. It will not be proper for the Court to supply such

deficiencies in accordance with its own conception of what it considers to be reasonable. In such matters it is the plaintiff's requirement which must first be considered. The fact that most of the terms of the contract have been agreed upon will not constitute a complete agreement unless all the essential or material terms of the contract have been agreed upon.

The parties in this case contemplated an agreement in writing, and it appears to me to be clear that the agreement cannot be properly reduced into writing without further reference to the parties as to the quantity to be delivered at each delivery, and the dates on which each delivery might be expected or would be made.

In the circumstances, it cannot, in this case, be said that the parties have agreed upon all essential or material terms of the contract for the supply of molasses for the season 1941-42, and on this ground alone the appeal will have to be allowed. The judgment and decree of the Rangoon City Civil Court are set aside, and the appeal is allowed with costs. The plaintiff will also be entitled to costs in the Court below.

As my learned brother and I differ on the first point to be decided in this appeal, we propose to state a point of law for reference to another Judge or such other Judges as the Hon'ble the Chief Justice may think it proper to arrange, namely,—

> Whether on the facts and in the circumstances of the case there is in law a complete contract between the parties.

For the purpose of this reference I ought also to state my views on the other points arising in this appeal. As the place of delivery of the molasses is Sahmaw, it will be necessary for the appellant to make arrangement for receiving the molasses at Sahmaw.

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In view of the fact that no arrangement was made for this purpose by the appellant I agree that, if there was a complete contract, it must be held that it was the plaintiff who had committed breach of the contract.

As regards to the deposit, the facts in the case of *Muralidhar Chatterji* v. *International Film Company, Limited* (1) are not on the same line as the facts in this appeal. In the Calcutta case the money was not paid as a deposit for the fulfilment of the contract as in this appeal, and I am accordingly not prepared to take a view different from what had been so far accepted, namely, that the buyer must show to entitle him to recover the deposit that the seller was in default; and in view of the finding arrived at by me on the second issue it must be taken, if there was a complete contract, that no default was committed by the seller.

[As the learned Judges differed on one point, the case was, under the provisions of section 28 of Union Judiciary Act, 1948, and section 98 (2) of the Code of Civil Procedure, placed before U Thein Maung, C.J.]

U THEIN MAUNG, C.J.—The following question has been referred to me as my learned brothers Tun Byu J. and Aung Tha Gyaw J. who were members of the Bench that heard the appeal differ in opinion thereon:

> Whether on the facts and in the circumstances of the case there is in law a complete contract between the parties.

They have stated it as a point of law as they probably have in mind the proviso to sub-section (2) of section 98 of the Code of Civil Procedure. However, to be on the safe side, I propose to deal with it

(1) (1943) I.L.R. 2 Cal. 213.

under the proviso to section 28 of the Union Judiciary Act, 1948, which applies not only to points of law but also to all other points.

The question has arisen in connection with the plaintiff-appellant's suit for recovery of Rs. 3,750 the receipt of which has been acknowledged by the defendant-respondent in these terms :

" Received from Mr. D. K. Parekh Rupees three thousand seven hundred and fifty only on account of cost of 375 tons molasses at Rs. 10 per ton deposited with us as security for fulfilment of contract for 750 tons molasses for season 1941-42." (*See* Exhibit A.)

According to this receipt the money was deposited partly as cost of 375 tons of molasses and partly as security for fulfilment of contract for 750 tons of molasses for season 1941-42. So it appears from this receipt that there was a contract between the parties as security for the fulfilment of which the deposit was being made. Besides, such deposits are usually made after the respective contracts of sale have been concluded. (*See* pages 44 and 45 of Pollock and Mulla's Indian Sale of Goods Act.)

The plaintiff-appellant has also stated in his plaint :

"1. On 25th November 1941 plaintiff deposited with defendant Rs. 3,750 as security for fulfilment of a contract for the supply of 750 tons of molasses by defendant to the plaintiff for season 1941-42. The defendant granted a receipt therefor, which is filed herewith.

2. Owing to war, a regular contract was not signed between the parties, nor any supply made.

3. The plaintiff is entitled to and claim a refund of Rs. 3,750 referred to above."

In paragraph 1 of the plaint he has admitted that the money was deposited as security for fulfilment of a contract for the supply of 750 tons of molasses for the

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season 1941-42. In the second paragraph he has merely stated that a regular contract was not signed on account of the war. He has not stated therein that there was no complete agreement between the parties; and it would appear from his plaint that he was claiming a refund of the deposit not because there never was a complete agreement but because "a regular contract" had not been signed.

The defendant-respondent pleaded in paragraph 2 of his written statement that there was a contract between the parties and that "the allegation that a 'regular' contract was not signed between the parties is not admitted but is in any event irrelevant." To that written statement the plaintiff-appellant filed a reply, paragraph 1 of which reads:

"1. With reference to paragraph 2 of the written statement, the plaintiff states that a formal contract was contemplated and agreed upon to be executed between the parties embodying the terms, as usual in Defendants' business, as typified in previous year's (1939-40) contract. It is not irrelevant, as alleged but most material."

In this reply also he did not state that the parties were still in negotiation and that they had not arrived at a complete agreement before the deposit was made. The formal contract which was contemplated and agreed upon to be executed by the parties is according to the reply to be a formal contract embodying the terms as usual in defendants' business.

At the hearing also the plaintiff-appellant merely stated in the course of his evidence:

"On 25th November 1941 I made a deposit with the defendant of Rs. 3,750. The understanding was that a formal contract was to be drawn up later containing the terms of the contract. Exhibit A is the receipt granted to me by the defendant. It is not correct that on the date of this receipt there was a regular contract between us. Formal contract was not

drawn up because Mr. Happel was busy as a Juror in the High Court."

It will be noticed that he has not stated that on the date of the deposit any particular term remained for settlement by agreement between the parties on a subsequent date and even with reference to a formal contract there was only an understanding that it was to be drawn up later containing the terms of the contract. He has not stated in the pleadings that the agreement was to be binding only when a formal contract was executed and he has not said so in his evidence either. On the other hand he has admitted under cross-examination, " when war broke out and circumstances made it impossible I did not want the contract to be executed. * * * In November 1941 my intention was to enter into a normal commercial transaction."

If the terms relating to delivery are so important that there cannot be a complete agreement between the parties unless and until they had settled them and if the agreement had not been complete as they were outstanding to be settled on a date subsequent to the date of the security deposit, the plaintiff-appellant would surely have said so in the pleadings and in his evidence ; but he has not done so.

Besides, the plaintiff-appellant has not offered any explanation as to why the security deposit was made, if as a matter of fact the parties were still in negotiation and some material terms remained to be settled by subsequent agreement between them.

The learned advocate for the plaintiff-appellant has submitted that in connection with the previous contract the security deposit was made before the formal contract was executed and that it must be presumed that some of the terms incorporated in the formal contract were settled by agreement only after

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the security deposit had been made. However, the security deposit was made on the 5th February 1940 and the formal contract was executed on the 7th February 1940, *i.e.* just two days later (*see* Exhibits B and C). So it is not inconsistent with the view that the terms of the agreement which were incorporated in Exhibit C had already been settled by agreement before the security deposit was made, that it only remained for a legal draftsman to draw up a formal contract incorporating them therein and that the agreement was intended by both parties to be binding even before the formal contract was executed.

For the above reasons I agree with my brother Aung Tha Gyaw J. that there was a complete agreement between the parties before the security deposit was made.

The only other question that remains for consideration is whether that agreement was to be binding only after a formal contract incorporating the terms thereof had been executed. With reference to this question the plaintiff-appellant has merely stated, "the understanding was that a formal contract was to be drawn up later." As I have already pointed out before he does not go further and say that the agreement was not to be binding till a formal contract had been executed.

"In such cases, as was said by Parker J. (as he then was), 'it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.'" [See *Shankarlal Narayandas Mundade* v. *New Mofussil Company, Limited (In Liquidation)* (1).] And what the plaintiff-appellant has himself described as an

(1) (1946) L.R. 73 I.A. 98 at p. 107.

understanding cannot be a condition. It must be a mere expression of the desire of the parties. As a matter of fact, the case for the plaintiff-appellant, as it has been argued before me, is that there was no complete agreement inasmuch as some material terms remained to be settled afterwards and the plea that if there was a complete agreement it was not to be binding till a formal contract incorporating the terms thereof had been executed is practically abandoned.

Besides, the facts which I have set out above (especially the fact that Rs. 3,750 has been paid partly as the price of 375 tons of molasses and partly as security for fulfilment of the contract) do not support the inference that the parties intended to be bound only when a formal agreement had been executed. [Cf. *Harichand Mancharam* v. *Govind Luxman Gokhale* (1).]

I accordingly agree with my brother Aung Tha Gyaw J. and answer the question which has been referred to me in the affirmative.

Both my learned brothers have agreed that, if there was a complete contract, there was no default on the part of the defendant-respondent, that there has been a breach of contract on the part of the plaintiff-appellant himself and that he is not entitled to a refund of the deposit. I accordingly confirm the decree of the Rangoon City Civil Court and dismiss the appeal with costs.

(1) (1923) L.R. 50 I.A. 25.