Supreme Court of Ceylon
No. 311 (Final) of 1950.

District Court, Colombo,
No. 20182.

IN HER MAJESTY'S PRIVY COUNCIL ON AN APPEAL FROM THE SUPREME COURT OF CEYLON

BETWEEN

HOLLAND COLOMBO TRADING SOCIETY LIMITED,
Colombo.....*Plaintiff—Appellant.*

VERSUS

1. SEGU MOHAMED KHAJA ALAWDEEN
2. MOHAMED OWDHU son of HAJA ALAWDEEN
3. MOHAMED LEBBE MARIKAR son of HAJA ALAWDEEN and
4. SEGU MOHAMED BUHARI son of HAJA ALAWDEEN all carrying on business in partnership under the name style and firm of "S. S. K. HAJA ALAWDEEN AND SONS" at No. 99 Second Cross Street,
Pettah, Colombo.....*Defendants—Respondents.*

RECORD OF PROCEEDINGS.

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Plaintiff-Appellant's Documents.

PART II—Plaintiff-Appellant's Documents—(*Contd.*)

Exhibit Mark	Description of Document	Date	Page
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P27	Customs Entry	2nd June 1948 ..	92
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P31	Letter from S. Kanagarajah to Julius & Creasy ..	10th Sept. 1948 ..	

Defendants-Respondents' Documents

Exhibit Mark	Description of Document	Date	Date
D 1	Invoice	6th. February 1948	81
D 2	Indent No. HCTS/85	5th. September 1947	Same as P 8

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Pettah, Colombo.....*Defendants—Respondents.*

RECORD OF PROCEEDINGS.

PART I

No. 1.
Journal Entries.

The 15th day of October, 1948. Messrs. Julius & Creasy file appointment and plaint together with document, a power of attorney.

Plaint accepted and summons ordered for 19–11–48.

Intld. S. J. C. S.,
D.J

29–10–48. Summons issued on 1st–4th defendants.

19–11–48. Messrs. Julius & Creasy for plaintiff.

Summons served on 1st–4th defendants through 1st defendant.

Proxy of all filed.

Answer 3/12.

Intld. S. J. C. S.

3–12–48. Mr. S. Kanagarajah for defendants.

Answer—filed.

Trial 22–9–49.

Intld. S. J. C. S.

14– 9–49. Proctor for defendants files list of witnesses and moves for summons on them. Proctor for plaintiffs received notice.

Re witness No. 1 obtain certified copy. No summons unless Proctor states that his personal attendance is necessary, subject to this allowed.

Sgd. H. A. DE SILVA.

16– 9–49. Summons issued on 3 witnesses by defendant.

16– 9–49. Proctors for plaintiff file list of witnesses and move for summons on them. Proctor for defendant received notice.

Re witness No. 5 obtain certified copies. No summons, subject to this allowed.

Intld. H. A. DE S.,
D.J.

No. 1. Journal Entries. 15-10-48 to 31-10-52. —*continued.*

16- 9-49. Proctor for plaintiff with notice to Proctor for plaintiff file list of documents.

File.

Intld. H. A. DE S.,
D.J.

16- 9-49. Summons issued on 5th witness by plaintiff.

22- 9-49. Trial

Messrs. Julius & Creasy for plaintiff.

Mr. S. Kanagarajah for defendant.

Plaintiffs' list filed. 10

Vide proceedings.

Intld. H. A. DE S.,
D.J.

1-10-49. Summons issued on 4th witness by plaintiff.

6-10-49. Trial

Messrs. Julius & Creasy for plaintiff.
Mr. S. Kanagarajah for defendant.

Vide proceedings.

Intld. H. A. DE S.,

7-10-49. Proctor for plaintiff files documents marked P1-P31. 20

Deficiency cts. 24 due.

Call for it for 4/11.

Intld. H. A. DE S.,
D.J.

7-10-49. Proctor for defendant files documents marked D1-D2.

Check and file.

Intld. H. A. DE S.,
D.J.

8–10–49. Deficiency called for.

12–10–49. Deficiency cents 24 affixed to and cancelled.

13–10–49. Trial

Messrs. Julius & Creasy for plaintiff.
Mr. S. Kanagarajah for defendant.

Vide proceedings.

Intld. H. A. DE S.,
D.J.

2–12–49. Notice Proctors that judgment will be delivered on 7–12–49.

Intld. S. J. C. S.

Eo die Proctors noticed. *Vide* notice acknowledged by Proctor.

7–12–49. Judgment delivered in open Court.

Intld. S. J. C. S.

Decree entered.

7–12–49. Mr. S. Kanagarajah, Proctor files petition of appeal of the defendant-appellants against the judgment of this Court dated 7–12–49 and tenders stamps to the value of Rs. 13.50 for certificate and Rs. 27 for S.C. decree.

Stamps affixed to certificate and S.C. decree form and cancelled.

Accept.

Intld. S. J. C. S.,
D.J.

7–12–49. The petition of appeal having been filed, Proctor for defendant-appellants moves to issue forthwith notice through Court on lawyer of the plaintiff-respondent.

Issue notice for 15/12.

Intld. S. J. C. S.,
D.J.

No. 1. Journal Entries. 15-10-48 to 31-10-52. —*continued.*

7–12–49. The petition of appeal having been filed, Proctor for appellant moves that he will deposit on 15–12–49, a sum of Rs. 250 being security for costs of appeal which may be incurred by the plaintiff-respondent and will on the same day tender a sufficient sum of money to cover expenses of serving notice of appeal on the plaintiff-respondent.

Proctor for plaintiff-respondent received notice.

Issue Voucher for Rs. 250.

Call on 15–12–49.

Intld. S. J. C. S.,
D.J.

12–12–49. Voucher for Rs. 250 issued.

15–12–49. Case called.

Messrs. Julius & Creasy for plaintiff-respondent.
Mr. S. Kanagarajah for defendant-appellant.

Proctor for plaintiff-respondent absent.

Security tendered is accepted.

Intld. S. J. C. S.,
D.J.

15–12–49. Proctor for appellant files bond and notice of appeal.

File.

Issue notice for 24/2.

Intld. S. J. C. S.,
D.J.

15–12–49. Proctor for appellant files application for 2 typewritten copies and moves for a voucher for Rs. 40.

Issue.

Intld. S. J. C. S.,
D.J.

15–12–49. K. R. K/8 23,963 dated 13–12–49 for Rs. 250 filed.

19–12–49. Notice of appeal issued on Proctors for respondent to W. P

19–12–49. Voucher for Rs. 40 issued.

5– 1–50. Mr. S. Kanagarajah, Proctor for defendant tenders herewith Kachcheri Receipt No. 025367 of 22 12–49 for Rs. 40 being fees for typewritten copies in this case.

Affix.

Intld. L. W DE S.,
A.D.J.

16– 1–50. Proctors for plaintiff-respondent file application for one typewritten copy and moves for voucher for Rs. 20.

Issue.

Intld. H. A. DE S.,
D.J.

17– 2–50. Voucher for Rs. 20 issued in favour of Proctors for plaintiff-respondent.

24– 2–50. Notice of appeal served.

Forward record to S. C.

Intld. H. A. DE S.,

11– 3–50. Proctors for plaintiff-respondent tender Kachcheri Receipt No. O/8 036003 of 7–3–50 for Rs. 20.

File.

Intld. H. A. DE S.,
D.J.

21– 6–50. *Vide* memo from Appeal Branch to call for additional fees from Proctor for appellant and Proctor for respondent.

Appellant—Rs. 60.
Respondent—Rs. 30.

Call for.

23– 6–50. Issued two vouchers with covering letters for Rs. 60 and Rs. 30 to Proctor for defendant-appellant and Proctor for plaintiff-respondent respectively.

INDEX

PART I

No. 1. Journal Entries. 15-10-48 to 31-10-52. —*continued.*

4– 7–50. K. R. S/8 No. 2,406/059787 of 28–6–50 for Rs. 30 filed.

7– 7–50. K. R. S/O No. 138/060217 of 3–7–50 for Rs. 60 filed.

12– 7–50. Record forwarded to Registrar, S. C., together with typewritten briefs.

29– 8–52. The Registrar, S. C., sends back the record. The judgment under appeal be and the same is hereby set aside and the plaintiff's action is dismissed with costs both here and in the Court below.

31–10–50. Registrar, S. C., moves to forward to him early the record and all connected productions in the case as final leave to appeal to Her Majesty the Queen has been allowed on 21–10–52.

Forward.

No. 2. Plaint of the Plaintiff. 6-10-48.

No. 2.
Plaint of the Plaintiff.

IN THE DISTRICT COURT OF COLOMBO

HOLLAND-COLOMBO TRADING SOCIETY LIMITED, Lloyd's Building, Colombo ... . *Plaintiff.*

Vs.

(1) SEGU MOHAMED KHAJA ALAWDEEN,
(2) MOHAMED OWDHU, son of Haja Alawdeen,
(3) MOHAMED LEBBE MARIKAR, son of Haja Alawdeen,
(4) SEGU MOHAMED BUHARI, son of Haja Alawdeen, all carrying on business in partnership under the name, style and firm of "S. S. K. Haja Alawdeen & Sons", at No. 99, Second Cross Street, Pettah, Colombo .. .. *Defendants.*

On this 6th day of October, 1948.

The plaint of the plaintiff abovenamed appearing by Geoffrey Thomas Hale, Frederick Claude Rowan, Joseph Francis Martyn, and Henric Theodore Perera, carrying on business in partnership in Colombo, under the name, style and firm of Julius & Creasy, and their Assistant, Hugh Ian Gibson, Alexander Nereus Wiratunga, John Peter Edmund Gregory, James Arelupar Naidoo, Alexander Richard Neville de Fonseka, Behram Kaikhushroo Billimoria, Lena Charlotte Fernando and Mohamed Shereeff Mohamed Shabdeen, Proctors, states as follows :—

1. The plaintiff is a Company with limited liability duly incorporated under the English Companies Act, 1929, and carries on business in Ceylon with a registered office at Colombo.

2. The defendants carry on business in partnership in Colombo under the name, style and firm of S. S. K. Haja Alawdeen & Sons.

3. The defendants reside, the contract sought to be enforced was made and the cause of action pleaded herein arose at Colombo within the limits of the jurisdiction of this Court.

4. On or about 5th September, 1947, the plaintiff Company agreed to sell and/or sold to the defendants and the defendants agreed to buy and/or bought from the plaintiff Company 300 pieces white shirtings (Dutch) called " Lucinde," each piece being about 42 in. × about 40 yards at 40*d.* per yard c.i.f. Colombo, and the defendants agreed to accept the said goods and to pay the price thereof by cash against documents.

5. The defendants wrongfully and unlawfully failed and refused to accept the said goods in the months of February, 1948 and/or pay for them at any time in accordance with the terms of the said contract of sale.

6. By reason of the breach by the defendants of their said contract, the plaintiff Company has suffered loss and damage in the sum of Rs. 13,697.06 which sum or any part thereof the defendants have wrongfully and unlawfully failed and refused to pay though thereto demanded. A cause of action has in the premises aforesaid accrued to the plaintiff Company to sue the defendants for the recovery of the said sum.

Wherefore the plaintiff Company prays for judgment against the defendants jointly and/or severally in the sum of Rs. 13,697.06 together with legal interest thereon from date hereof until payment in full ; for costs of suit and for such other and further relief as to this Court seems meet.

Sgd. JULIUS & CREASY,
Proctors for Plaintiff.

DOCUMENTS RELIED ON :

(1) Contract dated 5th September, 1947.

(2) Invoices and Bills of Lading, and

(3) Correspondence between the parties and their Proctors.

Sgd. JULIUS & CREASY,
Proctors for Plaintiff.

No. 3.
Answer of the Defendants.
3-12-48.

No. 3.
Answer of the Defendants.

IN THE DISTRICT COURT OF COLOMBO

HOLLAND-COLOMBO TRADING SOCIETY LIMITED, Lloyd's Building, Colombo ... ... *Plaintiff.*

Vs.

(1) SEGU MOHAMED KHAJA ALAWDEEN,

(2) MOHAMED OWDHU, son of Haja Alawdeen,

(3) MOHAMED LEBBE MARIKAR, son of Haja Alawdeen,

(4) SEGU MOHAMED BUHARI, son of Haja Alawdeen, all carrying on business in partnership under the name, style and firm of "S. S. K. Haja Alawdeen & Sons", at 99, Second Cross Street, Pettah, Colombo ... ... *Defendants.*

This 3rd day of December, 1948.

The answer of the defendants abovenamed appearing by Mr. S. Kanagarajah, their Proctor, states as follows :—

1. These defendants are not aware of the averments in paragraph 1 of the plaint.

2. These defendants admit the averments in paragraph 2 of the plaint.

3. These defendants admit only the jurisdiction of this Court and deny the remaining averments contained in paragraph 3 of the plaint.

4. Answering paragraph 4 of the plaint, these defendants state that the contract pleaded in the said paragraph does not satisfy the requirements of section 5 of the Sale of Goods Ordinance and that the alleged contract is unenforceable in law. The defendants put the plaintiff to the proof of the averments contained in paragraph 4 of the plaint.

5. Answering paragraphs 4 and 5 of the plaint these defendants

(*a*) state that the plaintiff intimated to the defendants that a part of the goods arrived in Colombo in April, 1948, and that the defendants refused to accept the goods as they were lawfully entitled to,

(*b*) deny all other averments in the said paragraphs.

6. By way of further answer these defendants state—

(*a*) that the contract pleaded in the plaint is unenforceable in law,

(*b*) that the plaint does not disclose a cause of action against the defendants,

(*c*) that in view of the above pleas, the defendants are not answering to the averments in the plaint in full or detail.

Wherefore these defendants pray that the plaintiffs' action be dismissed with costs and for such other and further relief as to this Court shall seem meet.

Sgd. S. KANAGARAJAH,
Proctor for Defendants.

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No. 4.
Issues Framed.

20,182/M. 22–9–49

Secretary of the plaintiff society present.

Mr. Adv. Kadirgamar for plaintiff instructed by Messrs. Julius & Creasy.

Third defendant present. Other defendants absent.

Mr. Adv. Kandiah for the defendants instructed by Mr. S. Kanagarajah.

Mr. Kadirgamar suggests the following issues :—

1. Did the plaintiff Company on or about 5–9–47 agree to sell or sell to
20 the defendants and did the defendants agree to buy or buy from the plaintiff Company 300 pieces of white shirting (Dutch) called Lucinde, description and price of which are given in paragraph 4 of the plaint ?

2. Did the defendants agree to accept the said goods and to pay the price thereof by cash against documents ?

3. Did the defendants fail and refuse to accept the said goods or to pay for them by cash against documents ?

4. If issues 1, 2 and 3 or any of them is answered in the affirmative, has the plaintiff Company suffered loss and damage ?

No. 4.
Issues
Framed.
—*continued.*

5. If so, what damages is the plaintiff Company entitled to ?

Mr. Kandiah objects to issue No. 3 as suggested by Mr. Kadirgamar because the words " to pay for them by cash against documents " is not pleaded in paragraph 5.

Mr. Kandiah suggests :

6. Does the agreement pleaded in paragraph 4 of the plaint satisfy the requirements of section 5 of the Sale of Goods Ordinance ?

7. If not, is the alleged contract unenforceable in law ?

8. Does the plaint disclose a cause of action against the defendants ?

9. If not, can plaintiff Company maintain this action ?

10. Did the plaintiff Company in April, 1948, intimate that a part of the goods had arrived ?

11. Did the defendants refuse to accept the said goods ?

12. Were the defendants justified in refusing to accept the said goods.

Mr. Kadirgamar has no objection to the Issues suggested by Mr. Kandiah being adopted.

Case goes to trial on Issues 1 to 5 suggested by Mr. Kadirgamar and Issues 6 to 12 suggested by Mr. Kandiah.

PLAINTIFF'S CASE :

Mr. Kandiah raises the following preliminary objection and he formulates an Issue. That is :

13. Is the plaintiff Company properly before Court ?

14. If not, can this action be maintained ?

Mr. Kadirgamar objects to the adoption of Issues Nos. 13 and 14 because they do not arise on pleadings. He says that if the Court allows these two Issues, namely, Nos. 13 and 14 he is entitled to ask for a date to meet those Issues and he also asks for his costs of today.

Mr. Kandiah says that he is not agreeable to have the two issues that he has suggested, namely, Nos. 13 and 14 on the terms laid down by Mr. Kadirgamar. He says that he wants those Issues Nos. 13 and 14, considered today and he does not want to give plaintiff a date to meet those issues.

ORDER:

No. 4.
Issues
Framed.
—*continued.*

Mr. Kandiah suggests Issues 13 and 14 and wants them to be adopted.

Mr. Kadirgamar objects to the adoption of those two issues as they do not arise on the pleadings. He also says that if the Court adopts those issues then he is not prepared to discuss the issues today and he asks for a date.

The application made by Mr. Kadirgamar is, to say the least reasonable. Issues 13 and 14 suggested by Mr. Kandian do not arise on the pleadings. It is no doubt true that relevant issue or issues can be raised although they do not arise on the pleadings. But those issues would be allowed only on condition that the other side that has not come prepared to meet those issues today are given an opportunity of meeting those issues. But Mr. Kandiah states that he does not want those issues on any terms. In other words what he says is that he wants the Court to adopt those issues even though the other side has had no previous notice. He does not want to pay costs of today and have those issues. In view of the attitude taken up by Mr. Kandiah I have no alternative but to refuse to adopt the two issues, namely, Nos. 13 and 14, suggested by him. Mr. Kandiah does not want those issues on terms. If Mr. Kandiah were willing to pay the costs of today I am prepared to allow him those two issues. But he does not want the issues on those conditions. Therefore the 2 Issues Nos. 13 and 14 suggested by Mr. Kandiah are rejected because they do not arise on the pleadings.

Therefore the case proceeds on Issues 1 to 12.

Mr. Kandiah moves that Issues Nos. 6 to 9 be considered as preliminary Issues because they go to the root of the case and dispose of the case. Mr. Kandiah says that Issues Nos. 6 to 9 can be disposed of without any admissions or without recording any evidence. He says that the Court can dispose of those Issues on the pleadings themselves. Therefore the Court will be justified in trying those as preliminary issues.

Mr. Kadirgamar objects to Issues 6 to 9 being considered as preliminary Issues. He says that those issues cannot be decided without the recording of any evidence.

ORDER :

Mr. Kandiah moves that Issues Nos. 6 to 9 be discussed as preliminary issues as they go to the root of the case. He says that those two issues can be decided without recording any evidence or without any admissions being made.

Mr. Kadirgamar is of a different opinion. He says that those issues cannot be decided on the pleadings alone. He says that evidence is necessary.

Under the circumstances the application of Mr. Kandiah to have Issues Nos. 6 to 9 decided as preliminary issues is disallowed.

Trial proceeds.

No. 5.
Plaintiff's Evidence.
Col. J. G. Vandersmagt. Examination.

No. 5.
Plaintiff's Evidence.

Mr. Kadirgamar opens his case and calls :

COL. J. G. VANDERSMAGT —sworn, Auctioneer, Broker & Valuer.

I am doing business under the name, style and firm of A. Y. Daniel & Son.

I received letter dated 4–5–48 from the plaintiff Company in this case, which I produce marked P 1. I took steps to sell by public auction this consignment of shirtings. I wrote letter of 6–5–48 to Messrs. Julius & Creasy, Proctors for the plaintiff Company, which I produce marked P 2.

I produce a copy of the advertisement I published marked P 3. I advertised the auction 5 days earlier. I conducted the auction on 11–5–48 for which date I had fixed the sale at No. 16 Warehouse, H.M. Customs.

At that auction sale there was a bid by a man called K. M. Buhari ; his was the highest bid. The amount of the bid was Rs. 15,584.40. He made a deposit of Rs. 1,000. He did not pay the balance and clear the goods. According to the conditions upon which the sale was held the purchaser had to pay down the full purchase value at the conclusion of the sale. But this man Buhari paid only Rs. 1,000. I took that money and I also took a subsequent deposit from him because he did not pay the whole amount. I got him to pay whatever he had with him. He paid me about 2 or 3 days later another sum of Rs. 1,500. He paid me in all Rs. 2,500 which he has forfeited. He did not implement the sale by paying the balance purchase money.

I reported to the plaintiff Company and they instructed me to put up the goods for sale again. The second sale was held on 11–6–48, also after due advertisement by me. That sale was held by my assistant because I was at that time in England. The second sale was held by my firm at my office. My assistant is Mr. A. M. Marzuk, who is a licensed Auctioneer.

Cross-examined :

Col. J. G. Vandersmagt. Cross-Examination.

(Shown P 1). This letter is written by the Holland-Colombo Ltd. In the letter P 1 addressed to me Holland-Colombo Ltd. is the firm that wrote to me. The words " Trading Society " are deleted in this letter. The plaintiff Company is the Holland-Colombo Trading Society Ltd. As far as I am concerned the plaintiff Company and the plaintiff who wrote to me are one and the same. I know that the Holland-Colombo Trading Society Ltd. changed their name subsequently. I do not know the laws of Incorporation of Companies. I cannot give the date when this Company came into existence. As far as I am aware I think the Holland-Colombo Trading Society has ceased to exist.

Re-examined—Nil.

Sgd. H. A. DE SILVA,
D.J.

22–9–49.

A. M. MARZUK—affirmed, 38.

No. 5.
Plaintiff's Evidence.
A.M. Marzuk. Examination.

I am an assistant at A. Y. Daniel & Son. I am also a Proctor of the Supreme Court. I am assistant to Col. Vandersmagt in the business of A. Y. Daniel & Son.

On 11-6-48 I conducted a sale at No. 20, Baillie Street, Fort, Colombo. No. 20, Baillie Street, Fort, Colombo is the office of A. Y. Daniel & Son. On that day I sold some white shirting material by public auction.

On 29-6-48, I wrote to the plaintiff Company a letter which I produce marked P 4. With P 4 I sent an account of the sales signed by me dated 29-6-48, which I also produce marked P 5. Our commission was Rs. 750.36 ; Rs. 954.36 was the total expenses. I advertised the sale at a cost of Rs. 195.40. There were two sales in respect of this consignment. The first sale was abortive. Reprints were for the second sale. We get no commission on the first sale. I sent the plaintiff Company two sums of money, namely, Rs. 14,052.84 and Rs. 1,000 both by cheque.

Cross-examined :

A.M. Marzuk. Cross-Examination.

Before the sale the letter from Plaintiff Co. was addressed to our firm. I sold 6 bales of shirting. The bales were opened just before the sale. The length of 11, 544 yards was obtained from the invoice. I cannot trace the document from which I got the number of yards. (Shown P 1). This is a letter by which I was asked to sell the goods. It is addressed to me by the Holland Colombo Ltd. I paid the amounts by cheque. (Shown P 5). This is addressed to the Holland Colombo Trading Society Ltd. I cannot remember in whose favour the cheques were sent. From P 1 it is clear that the party who requestsd us to effect the sale was the Holland Colombo Ltd. We were effecting sales for the Holland Colombo Ltd. Our correspondence was not with the Holland Colombo Ltd. The correspondence was with the Holland Colombo Trading Society Ltd. Subsequently, I believe, there was a change in the name. I cannot remember when the change took place. Originally the name was Holland-Colombo Ltd., I believe. Thereafter it was changed to Holland-Colombo Trading Society Ltd. This is as far as I recall.

Buhari paid us Rs. 2,500. We have given the plaintiff Company credit for Rs. 1,000. I do not know whether the balance Rs. 1,500 is lying with us or whether it was returned to the man or sent to the plaintiff Company. But I think this money is with us. It is not money that has been forfeited. Rs. 1,000 was forfeited which we have paid to the plaintiff Company. The other Rs. 1,500 I believe is lying with us ; I cannot say. I would not say that Rs. 1,500 was paid as the purchase price. It was given as some sort of security. I cannot say whether that Rs. 1,500 has already been returned to Buhari or whether it is still with us. This money was not sent to the plaintiff Company. The Rs. 1,500 was not taken at the instigation of the Company. We took the Rs. 1,500 from the man in order to induce him to complete the sale.

No. 5. Plaintiff's Evidence. A. M. Marzuk. Re-Examination.

Re-examined :

There was an abortive first sale on 11–5–48 conducted by Mr. Vandersmagt. Thereafter Mr. Vandersmagt went on leave to England. He went at the end of May 1948, and returned late in October.

I conducted the 2nd sale in the Fort. When the first sale was conducted by Mr. Vandersmagt the bales were lying in the Customs warehouse. For the 2nd sale it was brought to the Fort office. Whatever was brought from the Customs warehouse to my office was sold.

With letter P 5 I send 2 cheques to the plaintiff Company. These cheques have been passed and payment obtained by the plaintiff Company. Those cheques have not been returned. Irrespective of the name of the payee the cheques were passed and payment received by the plaintiff Company. One Haniffa bought those goods at the sale held by me. The cheques that were sent to the plaintiff Company were cheques of our firm.

Sgd. H. A. DE SILVA,
D.J.

22–9–49.

J. A. Perera. Examination.

JOSEPH ANDREW PERERA—sworn, 31, Accountant, Holland-Colombo Ltd., Bambalapitiya.

I am the Accountant and Secretary of the Holland-Colombo Ltd. I produce P 6 certified copy of the Certificate of Registration of this Company. This Company was registered on 10–11–36 here in Ceylon. This Company was established in England. The name of the Company was Holland-Colombo Trading Society Ltd. P 6 is registered in terms of our local Companies' Ordinance. At the date of registration this Company was known as Holland-Colombo Trading Society Ltd. The Colombo office of the Holland-Colombo Trading Society Ltd., converted itself into a Ceylon Company on 1–4–48 and it became the Holland Colombo Ltd., incorporated in Ceylon. It is the same Company except that we got that Company incorporated in Ceylon by a different name. Prior to 1–4–48 the name of the Company was Holland-Colombo Trading Society Ltd., with headquarters in London. We had a Colombo branch with a registered office in Colombo. That registered office had the name of the Head Office.

Plaintiff in this case is Holland-Colombo Trading Society Ltd. Holland-Colombo Trading Society Ltd., is an English Company incorporated under the English Act of 1929.

As Secretary of the Company I handle its correspondence. I received a letter dated 23–9–47 from the defendants in this case which I produce marked P 7. This letter refers to a transaction in regard to textiles.

I produce marked P 8 the contract signed by the defendant Company dated 5–9–47. This is addressed to the Holland-Colombo Trading Society Ltd. This is signed by the defendants. Letter P 7 refers to P 8.

Our London office offered to sell us 600 pieces of white shirting. We bought from them and we sold locally to two parties—one party was the defendants and the other party somebody else. We had at that time a textile canvasser. This order was canvassed by our textile canvasser. This canvasser contacted the defendants and he brought about the sale of 300 pieces of white shirting referred. These goods were to be sent to us in Ceylon from our London office. The price to be paid is stated in the document itself and also the mode of payment—cash against documents. The provision with regard to shipment in October/January, 1948, in one lot. The 300 pieces of textiles contracted for by the defendants were to be shipped in one lot between the period 1–10–47 and 31–1–48.

Defendants knew that at the time this indenture was entered into that the goods were coming from Holland. The goods were not in Ceylon at the time the agreement was entered into. Payment for these goods was to be made by the defendants " cash against documents."

I have been in this Company for the last 10 years. I am in charge of the Import Department. I put this transaction through. It was the canvasser who brought the party to me. " Cash against documents " means that we produce the shipping documents for the buyer and he gives cash to us and takes charge of the documents, and we make an endorsement on the documents authorising the defendants to receive the goods. By that endorsement we pass the title to the goods to the defendant. The shipping documents referred to are the invoice, bill of lading and certificate of origin. Defendants had to pay the money to us. Then we transferred the title to the defendants who went to the Customs and took the goods. Defendant had to pay us the money.

On receipt of letter P 7 I wrote letter P 9, dated 25–9–47 to them. I signed the letters myself. The principals referred to are the London office of the Holland-Colombo Trading Society Ltd.

I produce marked P 10 copy of my letter dated 15–1–48 which I wrote to the defendant Company.

(Mr. Kandiah says that he has the original of this letter.)

I received a reply from the defendant Company dated 15–1–48 which I produce marked P 11. There was no stipulation in this contract that the goods had to reach Ceylon by 31–1–48. The stipulation was shipment before 31–1–48. That means that the goods will be put on board a steamer on or before 31–1–48 at the port of origin.

I produce marked P 12 letter dated 16–1–48 which I wrote to the defendants. We refused to cancel the contract.

No. 5. Plaintiff's Evidence. J. A. Perera. Examination —*continued.*

I received letter P 13 dated 17–1–48 from the defendants. There is no stipulation with regard to delivery in the contract. According to the defendants at this time the goods should be delivered to them on or before 31–1–48.

I replied by P 14 dated 21–1–48. Then I wrote P 15 of 13–2–48. (Mr. Kandiah says he does not have the original of this letter but he has no objection to the copy being marked.) By this letter we informed the defendants that the goods were shipped on 28–1–48. We were advised by our London office that the goods were shipped on 28–1–48.

(Mr. Kandiah objects to the witness speaking to what the London office advised them about.)

Then I wrote letter dated 26–2–48 to the defendants copy of which I produce marked P 16. In this letter we have stated that the shipping documents have arrived and that we were sending them along with this letter. The value of the goods was put down in the letter, namely, Rs. 25,742.72. We requested the defendants by this letter to pay the said sum to enable us to give them the necessary documents to take delivery of the goods. Defendants did not come and pay. They did not send a cheque for that amount. I received from the defendants instead of the money the letter dated 28–2–48 which I produce marked P 17. With this letter they returned the 2 Invoices sent to them by us and referred us to their letter P 13.

Then I wrote letter dated 2–3–48 to the defendants (P 18). We had to send the proceeds to our London office. I called on the defendants personally before I wrote P 18. I told them that according to the terms of the contract the shipment has been made and that they had no leg to stand on. Their argument was insupportable. Defendants knew the meaning of the words "October to January shipment." Defendants are old business people. This is the first time we had dealings with these defendants. When I saw them prior to writing P 18 I showed them the bill of lading. I produce the bill of lading marked P 19.

I produce the invoice marked P 20.

Then I wrote P 21 dated 9–3–48 to the defendant Company. They did not pay.

Then I wrote P 22 on 3–4–48 to the defendant Company informing them of the arrival of the goods. Long before my letter P 22 defendant Company had refused to make payment.

I produce P 23 dated 12–4–48 written by me to the defendant Company. There was an interview with the defendant Company prior to writing P 23. I spoke to one of the partners. I spoke to the 3rd defendant who is present in Court, in his shop. Third defendant told me that the partner who signed the indent was away in India and that he was expected shortly back in Ceylon and that they would arrange to take up the documents as soon as he arrived. He

further told me that he could not decide the matter because the market was against them at the time and that they would lose heavily. To letter P 23, I received no reply.

I then handed matters to my Proctors who wrote to defendants letter dated 17–4–48 which I produce marked P 24. Defendants did not take up the documents.

Then I wrote P 1 to Col. Vandersmagt asking him to sell the goods by public auction at defendants' risk. The goods were ultimately sold by Messrs. A. Y. Daniel & Son by Public Auction. I received from A. Y. Daniel & Son letter P 4. I also received two cheques with this letter for Rs. 14,052.84 and Rs. 1,000 totalling Rs. 15,052.84.

I produce marked P 25 letter dated 6–5–48 written by my Proctors to the defendants.

I produce P 26 letter dated 28–8–48 written by my Proctors to the defendant Company setting out our statement of claim. Duty and dues amounted Rs. 2,804.11. This amount was paid by me.

I produce marked P 27 the Customs entry No. 102c dated 2–6–48 signed by me showing the duty and dues paid. It also shows that payment of this sum was made by us by cheque.

I also produce marked P 28 Import Warehouse extra rent form dated 3–6–48 showing that Rs. 84 was due and that this amount was paid by us.

I produce P 29 Import Warehouse extra-rent form showing payment of Rs. 42 in respect of this shipment. These two payments total Rs. 126 and is shown in P 26.

I produce marked P 30 an account dated 6–6–48 rendered to me by the New Landing & Shipping Co., Ltd., for landing this cargo from the ss. "Treport." Rs. 77.07 were paid by me. That amount is also shown in P 26 as landing charges.

I say that there is Rs. 13,697.06 due and owing from the defendant Company to the plaintiff Company in respect of which sum I have filed this action.

(*Interval*)

Sgd. H. A. DE SILVA,
D.J.

22–9–49.

No. 5.
Plaintiff's Evidence.
J. A. Perera.
Cross-Examination.

After Lunch :

J. A. PERERA—sworn. Re-called :

Examination-in-chief continued.—Nil.

Cross-examined.

I have been an employee of the Holland-Colombo Trading Society, Ltd., for a number of years, for 9 years. I joined the firm about 1938 or 1939. Before I joined them I was a student at the Commercial College. I am a Ceylonese. My first employment was in this firm. I was first assistant to the book-keeper, then I became the book-keeper and then the accountant. I am conversant with the accounting section of the firm. Since about 1942 the gentleman in charge of the Import Department was mobilised and left for Holland and I took over that department as well and I am still the manager of that department. I have been so now for a number of years. As regards the Exports Department I know about that department from the accounts point of view, but I am not in charge of it. Various gentlemen have been in charge of that department, each being in charge of various commodities. As regards the Import Department, it is not like that, I am in sole charge of that department. I have got clerks in that department. There are canvassers also working under me. At that time we had two canvassers. Thambyrajah was in the textile division and Anthony Pulle in the liquor department. The Holland-Colombo Trading Company is a company formed and registered in London and they had a branch office in Colombo. That branch office is registered in Colombo. The Directors of the Company in 1940 were : J. W. Olink, B. W. Olink, E. W Olink and W G. J. Lankester. They are the Directors of plaintiff Company. There was no Secretary in Ceylon. Mrs. E. W. Olink is the Secretary of the Company. Mr. E. W Olink was in Colombo and the other Directors were normally out of the Island. There was only one Director in Ceylon and he was almost all the time here in Ceylon. In 1947 he was in Ceylon. In 1948 too he was in Ceylon. Now he has gone on leave to London. He left early this year. This Company has various offices in Batavia and other places. E. W Olink was for sometime in Batavia and after that he came to Ceylon. In 1946 and 1947 he was not in Ceylon. They are Dutch people. They have an office in London also and they used to have an office in Holland. In 1947 and 1948 they had an office in Amsterdam. They had closed that office during the war and they have now re-opened it, I think since 1947. I am not sure of the date or month.

The branch office in Colombo has certain powers to deal with matters here. The branch here buys and sells locally and also import goods from England and sell them locally. We were not booking goods as indenting agents. I know what an indent is. What I call an indent is the contract form which is given to the buyer here and in which particulars of the goods are given and a serial number given to it—this is an indent and it is also a contract for the sale of goods.

The local branch here was converted into another Limited Liability Company under the local Ordinance under the name of Holland-Colombo Ltd. The Directors of that Company are : C. W. Olink, D. G. Deganart, and J. M. F Hampton. This local Company has its own shareholders. The Holland-Colombo Trading Society Ltd. has its own shareholders in London. E. W Olink is a shareholder of the Holland-Ceylon Trading Company. He is the only shareholder of that Company in Ceylon. The shareholders of Holland-Colombo Trading Society, London, hold all the shares of Holland-Colombo Ltd., except three. Those three people have one share each in the Colombo Company. Out of 150,000 shares of Rs. 10 each, 149,997 shares are held by the Holland-Colombo Trading Society of London and three shares given to local people who are Directors. The Holland-Colombo Ltd., is registered under the Companies' Ordinance in Ceylon and the Holland-Colombo Trading Society Ltd., is registered under the Companies' Act in London and the Directors are different. I am the Secretary of the Holland-Colombo Ltd. I am not a shareholder. I am paid a salary since the incorporation of the Company on 1-4 48. The local Company, that is the Holland-Colombo Ltd., took over all the assets of the Colombo branch. They took over all assets and liabilities of the Colombo branch of the Holland-Colombo Trading Society Ltd. Holland-Colombo Ltd., is the successor of the Colombo-branch of Holland-Colombo Trading Society Ltd. The Holland-Colombo Ltd. sends returns to the Registrar of Companies in Colombo. Before the Holland-Colombo Ltd., was incorporated in Ceylon in 1948, the Holland-Colombo Trading Society did not send returns to the Registrar in Colombo. The returns were made by the Head office in London itself. After Holland-Colombo Ltd., was incorporated we used the letter heads of Holland-Colombo Trading Society Ltd., because quite an amount of stock was left over and we made use of that. After 1-4-48 we deleted some words, like Trading Society Ltd., from the letter heads and retained the name Holland-Colombo Ltd., and we had the rubber stamp also as Holland-Colombo Ltd. Entries for Customs purposes and forms on which payments were made were all duly converted into Holland-Colombo Ltd. The Holland-Colombo Trading Society Ltd., Colombo, did all their work as they had done before April, 1948, under the name of Holland-Colombo Ltd. We have entered into contracts of sale locally. We have never entered into contracts for ready goods. We have entered into forward contracts—forward contracts to sell the goods at some future date. In such contracts the price is agreed upon but no place of delivery is agreed upon. The method of payment is agreed upon. The time when the goods will be delivered is not agreed upon. In the case of forward contracts I am not aware of any forward contracts where we agree upon the date or time of delivery. In forward contracts we do not stipulate delivery at all. We stipulate the shipment. We stipulate shipment only and never delivery in forward contracts. By shipment we mean that the goods will be put into the ship at an agreed time. In business circles we have a rough idea as to the time within which the steamer is expected to come here. For a ship to come from London the time taken is about 20 days if it does not touch at Indian ports and if it is a fast steamer. When a steamer goes to Bombay it has to wait outside the harbour sometimes for two weeks without getting a berth. Normally a ship will reach Colombo from London in 20 or 25 days provided it does not touch Indian ports. A good number of cargo boats do not touch all ports from London to Colombo

No. 5. Plaintiff's Evidence. J. A. Perera. Cross-Examination —*continued.*

now, formerly they touched. In 1947–1948 I cannot say whether cargo boats did not touch at any ports on the way. I cannot say at what ports a boat will call on its way to Colombo. We do not deal in goods from Africa. We have dealt with goods from America. If a ship leaves an American port such as New York it would come normally in 30 or 45 days. When we receive information that a steamer has left a certain harbour we write to our customers that the steamer has left that port and we expect it at a certain time. We do not say when we expect the steamer here. We merely say that the goods were loaded at a certain date. We do not take the trouble to find out or to inform the customers here when the steamer is expected in Colombo. We have not written to any buyer that we have heard from the shipping agents that the goods are expected at a certain date or within the next few days or so, it depends on circumstances as to whether we had done that. If we have at any time written to our buyers here that a certain steamer is expected to be in the Colombo harbour at a certain date that would be normally in reply to a query from them as to when they might expect the steamer. We do not calculate the number of days a steamer would take to come because we do not know at what ports the steamer will stop, we only ring up the agents here and find out. We have done that sometimes, that is to ascertain from the shipping agents the likely date of arrival of a ship. Whenever a buyer asks from us for the likely date of arrival of a ship we get the information from the shipping agents and inform him but that seldom happens because the buyer himself goes to the shipping office and finds that out. When goods are put into a ship at a foreign port that ship is normally expected to bring the goods to Colombo.

There is a printed form for forward contracts. We have only one form in our firm and that it a contract for the sale of goods. There are indenting agents in Colombo. We are not indenting agents. I have not heard of contracts for the sale of goods as distinct from an indent, they are indentical. That is how we have been dealing. We have not described ourselves as indenting agents. We state that we will get the goods from our principals meaning our London office. What we mean by principals is our London Office, that we would cause our London office to sell the goods. The form that we have is clear enough as to the terms of the contract. In that form we have not disclosed the name of the principal. So far as the buyer was concerned we were therefore free to buy from anyone we liked or to order the goods from anyone we liked. The invoices in such cases are made in our name. We agree to sell to the local buyer at an agreed price. We are the sellers. We have not agreed with anyone of our buyers that we were ordering or buying for them from foreign principals. We have agreed with local buyers to give goods to them at a certain price. Local buyers are not interested in the price we agree upon with our foreign sellers and we do not tell our buyers what our sellers sell to us for. Our Company in London are not manufacturers and they may be buying from somebody else. Our orders are always through our London firm. The London firm buys the goods. I am not aware how the London branch buys the goods. The Head office in London executes the orders we give them. The invoices are made against the Colombo branch. In the present case the London office has sent the invoice to us. The invoice is made out in the name of the defendants. We made the invoice our-

selves and sent it to defendants. That is done for our local accounting system. I am sure the London office did not send the invoice drawn in our name. If they sent it in our name that would mean that the goods were for us and we had to deal with the goods ourselves. In a contract for the sale of goods I believe both buyer and seller must sign because there are obligations and duties on both. The seller agrees to sell an agreed quantity of goods for an agreed price. I am not aware that the contract of sale has to be signed. I am not aware of any contract of sale where a stamp has been affixed.

(Shown P 8). This is addressed to the Holland-Colombo Trading Society Ltd., Colombo. It is addressed to the Colombo office. Defendants in this case had nothing to do with our London office. It is the Colombo branch that dealt with it. Defendants requested us to order and import for them. I know the difference between principal and agent. The principal cannot be the agent in the same transaction. In accepting P 8 we accepted it not as indenting agent. We accepted it as principals. We were ourselves going to sell these goods to defendant. P 8 is a forward contract for the sale of goods. A contract for the sale of goods must be signed by the seller and buyer. P 8 is not signed by both parties. It is signed only by the buyer. P 8 is not signed by the buyer at the place where the signature should be put. The buyer has to sign on the page intended for him. He has not signed it there. We did not ask the buyer to sign where he has signed it, he should have normally signed where he should sign but there are people who sign on both sides of the form or on either side of the paper. I am not aware of the legal position. We expected the buyer to sign that is all. We expected the buyer to sign on both sides. In this particular case he has signed on only one side. When the buyer signed on any side of the paper we have taken it. P 8 is described as indent No. 18CTS 85. In commercial parlance we take an indent to be a contract to buy goods from us at a stipulated rate. These are forms printed by us. This is the only form we have got. We agreed to sell the goods at a definite rate. I have heard of indents. There are firms which are indenting agents in Colombo. We have not placed indents with anybody. Indenting agents charge a commission. In respect of a contract for sale of goods there is no commission charged. Indents specify the commission and reveals the name of the supplier. In a contract of sale of goods there is no cage for commission and in our forms we have no cage for entering the rate of commission. When P 8 was given to us a contract was concluded between us and the buyer though we do not sign it. Because the Holland-Colombo Trading Society Ltd., has not signed the contract P 8 we followed that up and confirmed it. So that in order to arrive at the contract two documents P 8 and P 9 must be read together. P 8 and P 9 together form the contract. We confirm our part of the contract.

Q.—If you do not confirm there is no contract ?

A.—I cannot answer that.

(Shown P 8). I do not understand these lines to be cages in P 8. In P 8 there is provision made for insertion of the rate of commission if we want to. In

No. 5. Plaintiff's Evidence. J. A, Perera. Cross. Examination. —*continued.*

a contract for sale of goods there would be no provision for commission. I am not aware whether there is such provision or not in a contract for sale. The goods were sold on a c.i.f. basis here.

Q.—By P 8 defendants requested you to order and import for them the goods mentioned on the reverse ?

A.—We took it that they wanted to buy from us. They wanted us to import for them on a c.i.f. basis, that is because insurance and freight had to be paid by the buyer. The buyer had to pay the freight to Colombo. The transport from the ship's side to the wharf is borne by the buyer. The landing charges are borne by the buyer. We have charged for insurance also. The goods had to be insured. Payment was to be by cash against documents, that is the bill of lading, policy of insurance and certificate of origin. The certificate of origin shows from where the goods come that is for preference duty. In the case of the goods on P 8 we had the bill of lading and policy of insurance and certificate of origin. The policy of insurance is not in Court. A policy of insurance came to Colombo and it was surrendered to the Insurance Company because the steamer that loaded the goods caught fire in one of its holds and another steamer had to tranship this cargo. The steamer agents who are next door to us informed us that the steamer caught fire and we therefore gave the policy of insurance to the ship agent. We have letters to show that the ship caught fire. The goods were transhipped at Genea. There was an explosion after the ship left Genoa and the ship went back to Genoa. At the port of Genoa the goods were transhipped to another ship. The original boat was "Laurans Kerk" and the goods were transhipped to the "Triport." Our London office sent us the bill of lading and other documents. The invoice was made by our London office on defendants' contract and sent to us. I am sure of that. We sent the invoice to defendants along with the invoice prepared by us.

(Shown D 1). This bears the signature of one of our Directors in the Head Office. This is the invoice sent by our Head Office, London, dated 6th February with regard to these goods. It is an invoice made by our Head Office on us. What I said earlier that the invoice was made out against defendants by the Head Office is not correct. In D 1 they refer to indent No. 85 and export order No. 1225 and they say that the Colombo Trading Society is indebted to them for the goods sold to us and for our account and risk. This invoice is for 291½ pieces. P 8 is a contract for the sale of goods and we contracted to deliver 300 pieces. If we did not deliver 300 pieces and offered less the buyer could have refused to accept the goods subject to the clauses on P 8. According to the contract 300 pieces of 42 inches of about 40 yards each piece had to be delivered. What was really stipulated for was the yardage and not the number of pieces. We were selling textiles by the yard. On P 8 the order was that we should sell them 300 pieces of about 40 yards each. In the textile market we can never be sure how many yards we are going to get. You cannot be sure either of the number of pieces.

Cross-examination to be continued.

Sgd. H. A. DE SILVA,
D.J

22–9–49.

No time. Trial re-fixed for 6–10–49.

Sgd. H. A. DE SILVA,
D.J.

22–9–49.

6–10–49.

Trial resumed.

Secretary of the plaintiff Society present.

Mr. Adv. Kadirgamar, instructed by Messrs. Julius & Creasy, for the plaintiff.

Third defendant present.

Mr. Adv. Kandiah, with Mr. Adv. Thangarajah, instructed by Mr. Kanagarajah, for the defendants.

Plaintiff's case continued.

J. A. PERERA—sworn. Re-called : Cross-examination continued.

(Shown Indent No. 85). This is the indent copy that was left with the defendants ; it looks like the carbon copy of P 8.

(Mr. Kandiah marks the document D 2).

D 2 is not signed by the plaintiffs.

I have produced a number of letters. In none of them is disclosed to the defendants who our principals were. As a rule we do not disclose our principals. We keep regular books of account. We have a separate folio for the defendants in the books of the Colombo firm.

When I say " we " in connexion with this case I mean the Holland-Colombo Trading Society Ltd., that is, in connexion with this contract. The Holland-Colombo Trading Society Ltd., London and Colombo are the same. This is only a branch of that firm. We have debited the defendants in the books of the Colombo firm with the amount of this action as a debt due to us. When we recover the amount from the defendants we will remit it to the London office.

We received the invoice drawn on our London firm. We did not credit the London firm at that stage. When we recover the money we will remit the proceeds to London.

No. 5. Plaintiff's Evidence. J. A. Perera. Cross-Examination. —*continued.*

Naturally I have had a conference with my lawyers since the last date of trial.

P 8 is a contract for the sale of goods. It is not a contract of agency. (Shown P 10). I still say it is a contract of sale. At this time we did not know in what steamer the goods were to be shipped. We received an invoice from the London office about 2 or 3 days before we wrote to the defendants presenting the invoice to them. Before we received the invoice from the London office we knew when the goods would be shipped. We have written in P 10 that shipment will be made in or about 2 weeks time. According to the order the goods had to be shipped by October 1947/January, 1948. The goods were loaded on 28th January, 1948. We informed the defendants accordingly by P 15, on 13th February, 1948, we knew that the goods were shipped by the ss. " Lawrens Kerk." I cannot say whether on 13–2–48 we had received the documents.

By P 15 we indicated that these goods had been loaded on the ss. " Lawrens Kerk." We did not say when the ship was expected in Ceylon. As a rule we do not write to the customers informing them that a ship is expected on a certain date. My recollection is that the documents were received in Ceylon in the second half of February, 1948. (Shown P 16). We expected the ship ss. " Lawrens Kerk " to arrive by the 28th February, according to the information received by the local agents of the ship. Normally the ship would have come into Colombo harbour before the end of February, 1948.

(Shown D 1). This is an invoice in our name by the London office. This invoice accompanied other documents. Normally we would have received this in the second half February.

(Shown P 16). Along with P 16 we sent an invoice. That invoice is P 20. That is dated 19–2–48. Before 19–2–48 we had received these documents. P 20 was sent along with P 16 on 26–2–48. P 16 would normally have reached the defendants on the 27th when we indicated to them that the steamer is expected on the 28th instant.

It is the normal procedure in the trade to present the documents or the invoice and give them time to pay by the time the steamer arrives. It is not the practice for customers to clear the documents after the goods arrive. We expected them to clear the documents before the goods arrived. By " documents cleared " I mean that the purchaser has to pay the monies due and get the necessary authority from us to take the goods from the customs.

Q.—Do the customers pay and obtain documents about the time the ship comes into harbour ?

A.—It is not the general rule. They do it as often as not. The rule is that they should take up documents from us when we submit them, irrespective of whether the goods have come into Ceylon or not.

If the ship does not come to the harbour still the purchaser has to pay against the documents. The Insurance Company will indemnify the purchaser if there is any loss or non-delivery in Colombo. I am not aware if defendants verified if the steamer " Lawrens Kerk " arrived in Colombo on the 28th. " Lawrens Kerk " did not complete that voyage. Thereafter it came to Colombo in 1948 several times. The steamer was not wrecked.

P 19 is the bill of lading. We received P 19 in the latter half of February, 1948. This was sent to us from our London office. We received no other bill of lading thereafter. This bill of lading is in relation to the " Lawrens Kerk " The party to be noticed is Messrs. Holland-Colombo Trading Society Ltd., Colombo. The goods were actually consigned to us. We had the title to the documents which we could pass over to anybody. Until we passed the title to the goods we were actually the owner of the goods right through. Defendants at no time were owners of the goods covered by the bill of lading. If anything happened to these goods the proper party to claim the goods would have been we in Colombo or the London office. These documents are subject to the contract of sale we had entered into with the defendants. Without authority from us defendants could not take the goods on the basis of the bill of lading. We would not give the defendants the authority to remove the goods until our money was paid. If we so chose to do we could have passed the title to these goods to somebody else. Of course, then we would expose ourselves to an action for damages by the defendants.

In our correspondence P 8 is referred to as the indent. When we wrote P 21 on 9–3–48 we did not disclose our principals. On 9–3–48 we knew that the goods had not come to Colombo. On 9–3–48 we did not know why the steamer had not arrived. On 3–4–48 by P 22 we advised the defendant that the steamer " Triport " had arrived here with the goods. Thereafter I went and saw the defendants. I was told that the 3rd defendant was one of the partners. At the time I interviewed him I was informed that he was a partner. I suppose he had full authority to deal with the matter as he liked. (Shown P 23). I had a conversation with 3rd defendant whom I knew to be a partner. Third defendant did not tell me definitely that he did not want the goods. According to me the matter was in abeyance. Earlier by correspondence they had actually refused to pay for and take the documents. They described the gentleman who signed the indent as the proprietor, although the indent is signed by him as partner. We were prepared to give them time till the proprietor arrived. The 2nd paragraph of P 23 asks for the date when the " proprietor " will arrive. Third defendant did not say that he had nothing to do with the goods.

Thereafter I saw my Proctors, Messrs. Julius & Creasy, and they wrote P 24 dated 17–4–48. Probably I saw the Proctors a few days earlier. I lost no time after the 12th April to take action in this matter. I was not aware whether the proprietor had arrived or not. Because I failed to get a satisfactory reply from

No. 5. Plaintiff's Evidence. J. A. Perera. Cross-Examination. —*continued.*

them I took action. Third defendant never told me that he was not going to take delivery of the goods. Notwithstanding that I told my Proctors to take action in the matter. The goods were thereafter sold. The Proctor for the defendants replied to my Proctors. Defendants through their Proctor repudiated liability to pay any amount on 10–9–48.

My canvasser, R. Thambyrajah is present in Court. He has been with us for about 2 years. I am today an employee of the Holland-Colombo Ltd.

J. A. Perera. Re-Examination.

Re-examined :

I stated in cross-examination that after April, 1948, the Colombo branch of the Holland-Colombo Trading Society Ltd., was separately incorporated under the name of Holland-Colombo Ltd. I also stated that when the Colombo branch of the plaintiff Company was separately incorporated, the new Company the Holland-Colombo Ltd., took over all liabilities of the previous Company. The claim against these defendants in this case was not taken by the Holland-Colombo Ltd., when it was separately incorporated in Ceylon either as an asset or a liability. This claim still continued to be a claim of the Holland-Colombo Trading Society, Limited.

In the course of cross-examination I was questioned regarding my principals. By principals I always meant the London office of the Holland-Colombo Trading Society Ltd. (Shown P 19 Bill of Lading). If the defendants had taken up these documents we would have endorsed the bill of lading to the defendants. By endorsing the bill of lading we pass the title to the goods covered by the bill of lading to the defendants.

Under cover of my letter P 16 I sent the invoice to the defendants. The invoice was returned under cover of defendants' letter P 17. Defendants never asked us to endorse the bill of lading to them. If they had indicated that they were willing to take up the documents and pay cash we would have endorsed the bill of lading to them. I draw the attention of Court to Clause 16 of the bill of lading which provides for transhipment.

I produce letter from Proctor Kanagarajah to Messrs. Julius & Creasy dated 10–9–48 marked P 31.

Sgd. H. A. DE SILVA,
D.J.

6–10–49.

R. K. Subramaniam. Examination.

R. K. SUBBRAMANIAM—affirmed, 51, Customs Officer, Colombo.

(Shown P 27). According to this document the Customs duty and dues come to Rs. 2,804.11 and have been paid by the Holland-Colombo Ltd., on the goods in question. The goods arrived by the steamer " Triport." (Shown P 28 &

P 29). P 28 is a receipt given for further rent paid to the Customs in a sum of Rs. 84. P29 is the receipt for harbour dues in a sum of Rs. 42 paid by the Holland-Colombo Ltd.

No. 5. Plaintiff's Evidence. R. K. Subramaniam. Examination. —*continued.*

Cross-examined :

R. K. Subramaniam. Cross-Examination.

(Shown P 27). This entry was also made by the Holland-Colombo Ltd. Entries are not necessarily made on the basis of a bill of lading. Entries are made by people who are entitled to clear the goods. In this particular case the people who are entitled to clear the goods were the Holland-Colombo Ltd. But they may have been authorised by somebody to clear the goods. I do not know who authorised them to clear the goods. (Shown P 28 & P 29). These payments were also made by Holland-Colombo Ltd. These were actually filled up by the Holland-Colombo Ltd.

Sgd. H. A. DE SILVA,
D.J.

6–10–49.

W. R. MENDIS—affirmed.

W. R. Mendis. Examination.

(Shown P 30). This is a receipt given by the New Landing & Shipping Company for landing cargo from the ss. " Triport " to the Customs and delivering same to the consignee. The amount paid is Rs. 77.07.

Cross-examined :

W. R. Mendis. Cross-Examination.

This payment was made to us by the Holland-Colombo Ltd. We treated them as the consignees.

Sgd. H. A. DE SILVA,
D.J.

6–10–49.

Mr. Kadirgamar closes his case reading in evidence P 1 to P 31.

No. 6.
Defendants' Evidence.

No. 6. Defendants' Evidence. J. Weeraratne. Examination.

Mr. Kandiah opens his case and calls :

JAMES WEERARATNE—affirmed, 49, Clerk under the defendants, Ganemulla.

I work for other firms also. I work under some textile firms which are some of the biggest firms in Colombo. They are : S. T. R. Saley Mohamed & Co., H. A. Karim & Co., D. A. Khan and others who deal in textiles. I am thoroughly conversant with all that relates to the textile trade in Colombo. I have been working for the defendants for the last 7 years. We order goods direct and

No. 6. Defendants' Evidence. J. Weeraratne. Examination. — *continued.*

sometimes we place indents through indent agents. (Shown P 8). I was present when this document was signed. P 8 was signed in duplicate. P 8 is the original and D 2 is the carbon copy. Both documents are signed by only one of the partners of the defendant Company.

I say that P 8 is an indent. I say it is an indent because on the top of that the word " Indent " is used. Even if the word indent were not printed on this form I would still call P 8 and D 2 indents.

(Mr. Kadirgamar objects to the witness being made to read the various clauses one by one because the document is before Court. It is for the Court to interpret the document and not this witness.

Mr. Kandiah puts the question in the following form :)

Q.—Under what circumstances was P 8 entered into or for what purpose ?

A.—It was an order for 300 pieces of white shirting. We asked the plaintiff to order and import for the defendants. Plaintiff was to buy the goods anywhere they liked. We were not concerned as to where plaintiffs bought the goods.

Q.—Were the plaintiffs to act as your agents ?

A.—Yes.

This contract was on a c.i.f. basis. No insurance policy was shown to us or tendered to us. I do not know whether plaintiffs received any insurance policy. The documents shown to me were the bill of lading, certificate of origin and the invoice. All the letters written by the defendents were drafted by me. I have prepared documents like P 8 for other firms also. Defendants have entered into documents similar to P 8 with other firms. I am fully conversant with documents like P 8. There is a column for shipment in P 8. Normally a ship from London arrives in Colombo in about 3 weeks time. The same time is taken by a ship from Rotterdam.

When we speak of shipment in January we expect the goods in Ceylon in the latter part of February. That is the rule. These goods were originally expected in October-November shipment on the basis of the original October-November shipment. We expected the goods here in December. The goods did not arrive in December. In point of fact the goods were not put on any ship in October-November, 1948. In January, we were told that the goods would be shipped in January. I cannot remember the date the endorsement was made on this—it was in January. I was present at the time. It was plaintiff's canvasser who made the alteration in P 8.

Q.—Did the plaintiff's canvasser tell you anything at the time the alteration in P 8 was made ?

(Mr. Kadirgamar objects to the witness answering the question unless the canvasser is called.

Mr. Kandiah argues. He says that the canvasser is the agent of the plaintiff. It is common ground that it was the canvasser who put this transaction through. The witness called by the plaintiff admitted that the canvasser put this transaction through. The canvasser then was the agent of the plaintiff who put this transaction through. Therefore the agent's evidence can be led without calling the agent. He cites section 21 of the Evidence Ordinance.

Order.—Objection upheld. The witness is not called who is alleged to have made this statement. Section 21 of the Evidence Ordinance provides for admission. I do not think that this admission made by the agent comes under section 21 of the Evidence Ordinance.)

Examination-in-chief continued :

The canvasser made certain statements to me. As a result of those statements I expected the goods to arrive in Colombo either at the end of January or early in February. At the latest I expected the goods in Ceylon in February, 1948.

I drafted all the letters for the defendants. Defendants do not know English. I expected the goods in Colombo before the end of February. Thereafter plaintiffs wrote to us that the goods were actually shipped on 28th January, 1948. But the goods actually arrived in Ceylon somewhere in April, 1948. (Shown P 16). By this letter plaintiffs informed us that the ship was expected on or about the 28th instant. They also enclosed an invoice. (Shown D 1). This is the invoice drawn by the London principals of the Colombo firm for a certain sum. The name of the steamer is given here. This is dated 6–2–48. Indent No. 85 is referred to in this invoice. Indent No. 85 is the document P 8. Invoice P 20 was enclosed with letter P 16. P 20 states what the steamer is. P 16 is dated 26th February. We received the letter on the 27th. They informed us by this letter that the ship was expected by the 28th instant. We inquired from the steamer Agents whether the ship was due on the 28th February. The steamer Agents said that there was no news of the " Lawrens Kerk."

We pay and take the documents only when the ship arrives in the harbour. On the 28th February also we knew that the ship " Lawrens Kerk " was not coming into the harbour at all.

I remember subsequent to this Mr. Perera called at the defendant's office. I was present at the time. Mr. Perera brought the documents to our office. He did not bring the policy of insurance. He asked for payment. Third defendant said that the goods were late and that he did not want the goods. Third defendant did not say, " wait till the proprietor comes " Third defendant is a partner. He has full authority to act. All the four partners have the power

No. 6. Defendants' Evidence. J. Weeraratne. Examination. —*continued*

to act. The four partners take their turn in Ceylon. The defendants are Indians. The defendants did not want the goods.

Cross-examined :

J. Weeraratne. Cross-Examination.

I understand English well. I write and speak English well. I am very conversant with documents like P 8. P 8 has certain conditions printed on the reverse of it. Those conditions are binding on the parties to this document. P 8 is executed in duplicate ; one copy was kept by our firm. There is a shipment clause in P 8. That read originally " October-November in one lot " The words " In one lot " have been cut off. The words " January, 48 " have been written in English and also the words " In one lot " That is initialled by one of the partners of the firm. The person who signed the indent has also initialled the alteration. That person is 2nd defendant Mohamed Owdhu. He has also initialled the alteration. It is agreed that the shipment was " October-January, 1948, in one lot."

I was the person who was responsible for drafting all the correspondence between the parties. (Shown P 7 & P 9). We inquired whether the order was confirmed. We got a reply confirming the order. Between the plaintiffs and defendants the order was confirmed. (Shown letter P 11). This is sent by my firm. I drafted that letter. (Shown P 13). Our firm sent this letter.

Q.—You will agree that by the 17th January, 1948, your firm had decided to reject these goods if they arrived after 31st January, 1948, according to letters P 11 and P 13 ?

A.—Yes.

Our position at the date of P 13 was that the goods according to the contract must be delivered in Ceylon to us before the 31st January, 1948. That is still our position. (Shown letters P 16 & P 17). With P 16 plaintiff sent us only the invoice. By P 17 we returned the two invoices and we referred the plaintiffs to our letter of 17th January, 1948 (P 13). By our letter we stated that if the goods had not arrived before 31st January, 1948, we were not going to take delivery. (Shown letters P 18, P 21, P 22, P 24, P 25 written between 2nd March, 1948 and 6th May, 1948). These were letters sent by the plaintiffs to us. Defendants did not reply to any of these letters. (Shown bill of lading P 19). I saw this document before. Mr. Perera brought it to our office and I saw it. I agree that on the basis of the bill of lading the goods had been put on board at Rotterdam on 29th January, 1948. If I wanted title to these goods to be passed to us plaintiffs would have had to endorse this bill of lading to the firm. Defendants never asked plaintiffs to endorse the bill of lading to them. Plaintiffs were prepared to endorse the bill of lading to us provided our firm was prepared to make payment to them. But defendants were not prepared to make payment. By January, 1948, our firm had decided not to make payment and not to take the goods.

No. 6.
Defendants' Evidence.
J. Weeraratne.
Cross-Examination.
—*continued.*

I am very familiar with bills of lading. I have seen bills of lading issued by all sorts of carrier companies. Some bills of lading have transhipment clauses. In this bill of lading P 19 there is a clause provided for transhipment. There are some bills of lading without provision for transhipment. I do not know about the Hague Convention.

As far as this contract is concerned plaintiffs would have done their part if the goods were shipped before 31st January, 1948. According to the understanding of the trade plaintiffs would have performed their part of the contract if the goods were shipped before 31st January, 1948, at Rotterdam. "Being shipped" means being put on board a ship bound for Colombo. The bill of lading says that the ship "Lawrens Kerk" was bound for Colombo. Plaintiffs have put these goods on board a ship before 31st January, 1948, bound for Colombo.

In business an indent is separate from a contract. Usually these things, these documents, are called indents. I know the difference between an indent and a contract of sale. A contract of sale should be signed by both the parties on a stamp. That is a contract of sale as I understand it. Anything signed by only the buyer is not a contract of sale but is only an indent. That is my understanding. I have not read the Sale of Goods Ordinance. I have not read any books on sale of goods or on contracts. If the plaintiff Company refused to supply these goods after P 8 was entered into, defendants could not have sued them for damages. I know the difference between an indent and a contract. After P 9 was written by the plaintiffs to the defendants if the plaintiffs refused to sell these goods to the defendants, defendants could not have sued the plaintiffs. We could not sue the plaintiffs for damages.

Re-examined :

J. Weeraratne.
Re-Examination.

(Shown P 11). This was drafted by me. The statements contained in P 11 are correct. (Shown P 13). This was written by me. The statements contained herein are correct.

The indent provided for shipment in one lot in January. Notwithstanding letters P 11 and P 13 if the goods arrived in February by ss. "Lawrens Kerk," we would have accepted the goods. The bill of lading states that the goods were being shipped per ss. "Lawrens Kerk."

(Shown P 8). This does not provide for any transhipment.

Sgd. H. A. DE SILVA,
D.J
6-10-49.

Mr. Kandiah closes his case reading in evidence documents D 1 and D 2.

No. 7.
Addresses to Court.

No. 7.
Addresses to Court.

Mr. Kandiah addresses Court :

A distinction must be drawn between an indent and a contract of sale of goods. In a sale of goods one party agrees with the other to sell so much goods. Then he is the principal who has to sell the goods. In such cases both parties must sign the documents.

When it is stated that shipment is within a certain time that does not mean that the goods must be delivered on that date. What is really agreed is that the goods must be shipped on or before a certain date.

The Sale of Goods Ordinance does not speak of shipment but it speaks of delivery. What is understood by shipment is to take delivery. When one says shipment before 31st January it does not mean that the goods must be delivered before 31st January.

This is an agreement regarding the quantity of goods, quality, price, etc., and time of delivery. Time of delivery may be substituted by the words " from the date of shipment ". If it is a contract of sale and if the parties so agree it must be provided for in the contract of sale. If the contract does not provide for it the contract is void. Plaintiffs have come into court founding their case on a contract for the sale of goods.

On the other hand, there is the indent. Indent means where one party requests the other to order on his behalf goods for him on certain terms and conditions. It may be on a commission basis, or the commission may be included in the price itself ; it may be on a c.i.f. basis or any other basis. c.i.f. means cost-insurance freight. This is an indent on a c.i.f. basis. It is possible to have a contract of sale on a c.i.f. basis. Contract of sale are generally done on a c.i.f. basis. In which case it is also necessary for the seller to tender the policy of insurance. When it is an indent the person ordering the goods is really acting as a commission agent for the defendants. In the case of an indent the liability or obligations and rights are as between a principal and an agent. There is no question of a buyer and seller there. The obligations and rights that arise between a buyer and a seller do not arise as between a principal and an agent. In the case of an indent a commission for the agent is provided for. Sometimes the commission is separately stated in the indent or sometimes the commission is included in the price quoted. The test is whether there is a provision for the insertion of commission in the indent form.

He cites 24 *N.L.R.* 267. This authority shows the distinction between an indent and a contract for the sale of goods. He also cites 25 *N.L.R.* at 353.

In the case of an indent if there is no shipment the commission agent would not be liable if he failed to secure shipment. There are no damages for late

shipment etc. If the goods had been shipped on the 1st February and if they arrived here there would be no claim whatsoever against the commission agent by the party for whom the commission agent acted. No. 7. Addresses to Court. —*continued.*

Plaintiff should have come into court on the basis of an indent dated and numbered—that is the plaintiff's remedy. It is not a question of a contract of sale. If the goods arrived in February by the "Lawrens Kerk" defendants would have had no defence whatsoever on the basis of shipment. Plaintiffs come to court on a clear contract for the sale of goods. No mention is made of a writing or a part payment.

Sgd. H. A. DE SILVA.
D.J.
6-10-49

(*Interval*)

(*After lunch*)

Mr. Kandiah continues his address :

Cites section 5 of the Sale of Goods Ordinance, Chap. 70, Vol. 2, Page 192. Paragraph 4 of the plaint does not say that there was a memorandum in writing. There must be an insurance policy tendered in a c.i.f. sale. If it is a c.i.f. and c. sale it will not be a contract but only a contract of agency and then other considerations will arise. Plaintiff before he comes to Court must prove that he has performed his part of the contract, if there is a contract. If the goods had been shipped after 31-1-48 then Court will not grant damages to plaintiff because defendant will be entitled to refuse to accept the goods. If it is a pure agency plaintiffs would be only defendants' agent. Rights under the insurance policy cannot be transferred by an endorsement. Defendants answered purely to the plaint. The object of issue No. 8 is this, plaintiff must put it in the form of an issue as to how he has claimed this amount. He must put in issue when shipment was supposed to be and he must state he has tendered to the defendants the documents including insurance policy. That is not stated in the plaint. Therefore plaint does not disclose cause of action against defendants. It is not a contract for sale of goods but an indent pure and simple. If it is a contract of sale other rights and obligations flow from it. Evidence of J. A. Perera, who should be plaintiff in this case is not clear at all. All dealings were with plaintiffs in Colombo. That is admitted by plaintiffs. Principals not disclosed to defendant. J. A. Perera's evidence. No mention of insurance policy. No mention that insurance policy was tendered to defendant. It is common ground that the ship " Lawrens Kerk " did not come into Colombo harbour with the goods. It is alleged that some goods with the same mark arrived in Ceylon by the " Triport." Whether identical goods came there is no evidence. If the

No. 7. Addresses to Court. —*continued.*

goods came by the " Triport " there must be a bill of lading to show that the goods came by the " Triport." Steamer cannot carry goods without a bill of lading. Bill of lading is a contract of freight. The proper party to sue is the Colombo firm, it is with them that the contract was entered into. Colombo firm has now become Holland-Colombo Ltd., since April, 1948. The sale was not effected by plaintiff firm but by another firm. Defendants' dealings were with plaintiffs' firm and that firm had ceased to exist. The firm having ceased to exist how can they sue defendants. Defendants had nothing to do with London firm. The local firm with whom they dealt was the proper party to sue. Directors of the London firm are different from Colombo firm since April, 1948. The shareholders are also different. No evidence that the ship caught fire in Genoa. The evidence of J. A. Perera is mere hearsay. It is the Colombo firm who has debited the amount in their books to defendant in the books of Holland-Colombo Ltd. If transhipment would vitiate a contract of this type. Question of transhipment must be considered. No evidence of transhipment at all.

Defendants' evidence has been short. Mr. Kandiah concedes that if the shipping had been done before 31–1–48 a part of the contract had been satisfied by plaintiffs.

It is now 4 p.m. Documents P 1 to P 31 tendered by Mr. Kadirgamer, and D 1 to D 2 tendered by Mr. Kandiah.

Mr. Kandiah says he has not finished his address. Further hearing on 13th October.

Sgd. H. A. DE SILVA.
D.J.
6–10–49.

Trial Resumed.

Appearances as before.

Mr. Kandiah continues his address :

Cites (1919) *I.K.B.D.* Vol. I, 198 at 202. Vendor is under obligation to tender a proper policy of insurance to the vendee, pp. 204, 205. Mr. Kandiah says it is true that even long before the ship came defendants had refused to take delivery of the goods and pay for same. In other words defendants repudiate their part of the contract.

1942 *L.R. House of Lords* 361, *Heyman vs. Darwins Ltd.* No doubt there has been repudiation on the part of defendants but plaintiffs did not accept that repudiation.

1920 *A.C.* 149. When a vendor comes to Court on a c.i.f. contract the duty is cast on him to tender the necessary documents to the buyer, namely, bill of

lading, policy of insurance and invoice. The failure to tender any one of those is fatal or if the documents do not conform with the c.i.f. the buyer is entitled to repudiate the contract. If the goods are not up to sample the buyer will have an action for damages against the seller but if the goods are lost he will have an action against the shippers or the underwriters.

24 *N.L.R.* 267 at 271. In this case it was definitely held that policy of insurance must be tendered, pp. 272, 273. No evidence in this case that there was a tender of either the policy of insurance or certificate of insurance. 25 *N.L.R.* 353 at 354. The goods in this case were consigned to plaintiffs' Colombo branch and not to defendants. The invoice was drawn on the Colombo branch. Plaintiffs' witness admitted that the invoice was made out in the name of defendants but later contradicted that evidence and said the invoice was made out in the name of the Colombo branch of the plaintiffs. On 1/4, the Colombo branch ceased to exist and Holland-Colombo Ltd. its successors came into being as from 1–4–48. Plaintiffs' witness has admitted that this contract was not taken over by the successors. Defendant was entitled to reject the goods because the indent was not drawn on the defendants. To take delivery it is not necessary to endorse the invoice and the policy of insurance. All that is necessary for defendants to take delivery is the bill of lading. Under a c.i.f. contract parties are entitled to reject a document which is not in order. It is from the invoice that the ship owner or underwriters have to decide as to whom the damages should be paid in case of their liability. Holland-Colombo Ltd., cleared the goods. Who is the proper party to sue in this case ? Defendants undoubtedly lost because the goods did not arrive in February, but came late after the price of goods had gone down. Defendants were entitled to reject the goods if the quantity asked for was less. On that ground alone defendants are entitled to reject the goods and repudiate the contract. 25 *N.L.R.* 363. Tender of documents is all important in a c.i.f. contract. Plaintiff has not stated his cause of action in the plaint. Cites 21 *N.L.R.* 289. No evidence of transhipment. No evidence that goods were put into the " Triput " on any date after 31–1–48. Every ship carries a manifest which shows what the goods in the vessel are. If ship's agents had been summoned they would have produced the manifest.

Cites 3rd Ed. Eldridge on *Marine Policy* at pages 62, 63. Defendants could have refused to accept the insurance policy in view of the deviation.

Mr. Kadirgamar replies :

Submits this is a contract for sale of goods. P 8 is the vital document. That document is nothing else than a contract for sale of goods. Two contracting parties being Holland-Colombo Trading Society Ltd. and the defendants. Defendants have signed the contract. Cites *Benjamin on Sales*, 171, 172. 30 *L.J.Q.B.* 252 at 253.

Two points raised. P 8 is a note or memorandum of the contract. It satisfies the provisions of section 4 of Sale of Goods Ordinance, Chap. 70, P 8 is

No. 7. Addresses to Court. —*continued.*

evidence of the contract. P 8 satisfied section 5. *Chalmers on Sale of Goods*, 12th Ed. 30. In this connection reference is made to P 7 and P 9. What was confirmed is the entire contract. Three points raised is that the wrong party is the plaintiff. Refers to paragraph 1 of the plaint. A corporate entity can carry on business in more than one place. Evidence is that plaintiff is still in existence. In 1947 it carried on business both in London and Ceylon. Certificate of Incorporation is P 6. This shows Company was incorporated in England. P 6 is registration under the local Companies' Ordinance. Evidence of Perera that from 1–4–48, Colombo branch became incorporated under the Ceylon Ordinance. That does not mean that Holland-Colombo Trading Society ceased to exist. A new company has been formed in Colombo which has a separate existence now since 1–4–48, and they look after the interests of plaintiffs here in Ceylon.

Third point raised—in order to find out the respective rights of parties one must look into the contract, that is P 8. Defendants' witness said that P 8 contains the rights and duties and obligations of parties in respect of this contract. It was argued by defendants' Counsel that P 8 if any was only a contract of agency and not a contract of sale. If it is a contract of agency then plaintiffs must be somebody's agents, it is not suggested that plaintiffs is defendants' agents. It was never suggested that plaintiffs was defendant's agent. Even if plaintiff is the agent of an undisclosed foreign principal it is the plaintiff who had the right to sue. *Benjamin on Sale*, 262. 1.*C.W.R.* 125. *Benjamin*, 238, 240, 250, 257. There is an admission by defendants' witness that goods were shipped before end of January, 1948. Bill of lading P 19 and P 15 letter of 13–2–48. All this trouble arose as a result of the view taken by defendants that shipment October-January meant that goods had to arrive in Ceylon before end of January, 1948.

Tender of Policy of Insurance—plaintiff has done his part of the bargain when he put the goods on board a ship before 31–1–48. Defendants did not reject the goods at the time they were offered on the ground that no policy of insurance was tendered. Even after case came to trial no issue was raised as to whether policy of insurance was tendered or not. The answer to the argument regarding the policy is to be found in P 11 and P 17. They are two letters written on 15–1–48 and 28–2–48 by defendants to plaintiffs in which they say they would not take the goods. Both these letters were written by defendant before plaintiff was in a position to tender the bill of lading or insurance policy or invoice. Vide evidence of Weeraratne. In January 1948 they had made up their minds not to accept the goods. Once defendant had indicated to plaintiff they would not under any circumstances take the goods and pay for them, there was no necessity or obligation to tender any of the c.i.f. documents. That argument of Mr. Kandiah is met by reference to clauses 12 and 4 of the contract P 8. According to that there is no obligation on plaintiff to tender policy of insurance. This agreement and the clauses contained there were drafted after the decision cited by Mr. Kandiah. Weeraratne admits having seen the bill of lading. On P 8 no obligation for plaintiffs to tender the insurance policy. 39 *N.L.R.* 313. The only obligatory document in this case was bill of ladin

No. 7. Addresses to Court. —*continued.*

which was tendered and refused. Counsel refers to 24 *N.L.R.* 267. In that case Supreme Court was considering only the document which has been reproduced. In the document considered in 24 *N.L.R.* case there is no clause such as the one found in P 8 with regard to the insurance policy, etc. In the absence of special provisions in the agreement the general law applied. Cases cited by Mr. Kandiah 1919, I *K.B.* and 1920 *A.C.* refer to ordinary c.i.f. contracts. C.i.f. Colombo means that plaintiff had to bear the cost insurance and freight, etc. By this agreement defendant only agreed to pay 40*d.* per yard landed in Colombo. Normally in c.i.f. contracts the seller will have to pay the freight and insurance.

Shipment and transhipment.— As regards deviation the authority cited by Mr. Kandiah only relates to marine insurance policies where the underwriter disowns liability after the happening of the event, that is the loss of the goods on the ground that there had been an unauthorised deviation. No authority has been cited that deviation will void the contract of sale. No issue with regard to deviation or transhipment. On transhipment refers to *Benjamin* at page 621. This bill of lading is what is called a through bill of lading. The bill of lading makes provision for transhipment in clause 16.

Was defendant entitled to reject because quantity was short ? Plaintiffs' contract to supply 300 pieces and tendered 291. No issue raised in regard to tender if lesser quantity. Draws attention to P 11 letter of 15–1–48 from defendants. P 17 of 28–2–48. Invoice stated how many pieces were landed. P 18, P 21, P 22, P 24, P 25 from plaintiffs to defendants asking defendants to pay. In 10–9–48 no exception taken to shortage. Refers to clause 12 of the agreement. This provides for contingency of arrival of shorter quantity Clause 1, sections 30 and 54 of Sales of Goods Ord. which lays down that every contract of sale shall be according to agreement between the parties. If there is no specific agreement then common law will apply. With regard to the point that the invoice had come drawn in favour of the Colombo branch reads P 16 letter from plaintiffs to defendants sending the invoice. By P 7 defendants returned the invoice. There was an invoice drawn on defendants by the Colombo branch of plaintiff's firm.

Sgd. H. A. DE SILVA.
D.J.
1–310–49.

C. A. V

No. 8.
Judgment of the District Court.

No. 8. Judgment of the District Court. 7-12-49.

Judgment.

Plaintiff which is a limited liability Company sues the defendants who are carrying on business under the name, style and firm of S. S. K. Haja Allawdeen & Sons, for the recovery of a sum of Rs. 13,697.06. Defendants deny liability. The case went to trial on 12 issues framed and adopted on the 22nd of September, 1949. The case shortly is as follows :—Plaintiff is a Company with limited

No. 8. Judgment of the District Court. 7-12-49. —*continued.*

liability duly incorporated under the English Incorporation Act of 1929 and carries on business in Ceylon with a registered office in Colombo. On or about 6th September, 1947, the plaintiffs' Company agreed to sell and/or sold to the defendants, and the defendants agreed to buy and/or bought from the plaintiff Company 300 pieces white shirtings (Dutch) called Lucinde, each piece being about 42 inches by about 40 yards at 40*d.* per yard c.i.f. Colombo and the defendants agreed to accept such goods and pay the price thereof by cash against documents. Defendants wrongfully and unlawfully failed to accept the goods in the month of February, 1948, and pay for same at any time. The plaintiffs by reason of the failure on the part of the defendants to accept the goods and pay for same suffered damages in a sum of Rs. 13,697.06, which sum is claimed in this suit. The plaintiff Company at the date material ran a branch office in Colombo where they did business. Their business was registered in Ceylon under the Companies' Ordinance and the Certificate of Registration has been produced marked P 6. The contract pleaded has been produced marked P 8. Defendants do not deny entering into this particular contract. The relevant parts of this agreement are as follows :

> " 300 pieces 42 in. by about 40 yards white shirting (Dutch) Lucinde, 40*d.* per yard c.i.f. Colombo. Cash against documents.
>
> October/January, 1948 in one lot against dealers Textile Licence No. 914/C 914."

One of the defendants has signed this contract. This contract is dated 5th September, 1947. On the back of this various conditions attaching to the contract are laid down. By letter dated 25th September, 1947, P 9, defendants confirmed this contract. It would appear that the Colombo branch of the plaintiff Company communicated with their Head office who are their principals and they having agreed to sell the goods to the defendants the letter P 9 was sent. So that the contract P 8 signed by the defendants and the letter P 9 signed by the plaintiffs' representative in Ceylon must be taken to be the contract entered into between the parties. The difficulty would appear to have arisen as a result of a misunderstanding on the part of the defendants as to what October-January, 1948 shipment meant. Defendants would appear to have taken the view that the goods had to be delivered in Colombo by the plaintiffs before the end of January, 1948, according to the terms of this contract. The plaintiff Company maintained all throughout, and rightly so, that October-January, 1948 delivery meant that the goods had to be shipped at the port of origin before the end of January, 1948, and, accordingly these goods were shipped at the port of origin on the 28th of January, 1948, so that plaintiff maintained that they have carried out the conditions as understood in a c.i.f. contract. Defendants now concede that when the plaintiff Company loaded the goods into the ship at the port of origin before the end of January, 1948, that part of plaintiff's contract has been well and sufficiently carried out by the plaintiff. Correspondence appears to have gone on between the parties with regard to this matter. By letter dated 15th January, 1948, P 10, plaintiff informed the defendants that it had received information from its London office that shipment would be made in about two

weeks time. To that defendants replied by letter of even date. In this letter P 11 defendants in no uncertain terms have intimated to the plaintiff that if the goods arrived in Colombo later than 31st January, 1948 they (defendants) were not liable to accept same. Defendants also requested that if the goods did not arrive in Colombo on the 31st of January, 1948, to consider the order as cancelled. Letter dated 16th January, 1948, was sent by the plaintiff to the defendants in reply to defendants' letter P 11. Plaintiff intimated to the defendants that it had complied with the requirements of the contract by shipping the goods before the end of January, 1948, and that there was no possibility of cancellation of the contract at that stage and that the shipping documents would be presented to defendants in due course. To that letter defendants replied by letter dated 17th January, 1948, P 13. They repeated what was contained in P 11 and refused to accept the goods and repudiated the contract because, according to them the goods should have arrived in Ceylon by the 31st of January, 1948. To that the plaintiff replied by letter dated 21st January, 1948, P 14. In this letter plaintiff refused to consider a cancellation of the contract. Plaintiff also pointed out that there was no such mention as delivery but that the indent clearly stipulated shipment in one lot, January, 1948. On 13th February, 1948, plaintiff wrote to the defendant letter P 15. This letter runs thus :

> " Further to our letter of the 21st. ultimo, we are advised by our London office that your above indent has been executed by ss. " Laurenskerk " which loaded on the 28th January. The relative documents will be presented to you for payment in due course."

By letter dated 26th February, 1948, P 16, plaintiff intimated to the defendants that it had received the documents relating to this shipment from its London office with instructions to present same for payment according to invoice No. 13,096 for Rs. 25,742.72 covering the shipment, and plaintiff also stated that it would hand over the necessary documents. *Vide* further letters dated 28th February, 1948, P 17, and 2nd March, 1948, P 18, sent by plaintiff to defendants. P 17 runs thus : " We return herewith the two invoices attached to your letter of the 26th instant and would refer you to our letter of the 17th ultimo in this connection " By the letter of 2nd March, 1948, P 18, plaintiff intimated to the defendants that the shipment was made entirely in conformity with the terms and stipulations in the indent. That letter also says that the bill of lading was personally shown to the defendants. Defendants were told in this letter that their failure to accept the documents and pay for same would be a breach of contract. The goods ultimately arrived in the early part of April, 1948– *vide* letter of 9th March, 1948, P 21, sent by plaintiff to the defendants. The invoice submitted is produced marked P 20. On the 3rd of April plaintiff wrote to the defendants P 22 stating that the goods shipped by ss. " Laurenskerk " have arrived by the steamer ss. " Triport " Plaintiffs were called upon to make the payment to enable defendants to hand over the documents to defendants. A further letter dated 12th April, 1948, P 23 was sent by plaintiff to defendants. Plaintiff consulted its lawyers and the goods were sold by public auction at the risk of defendants, defendants having failed to pay for same and take delivery. Mr. Vandersmagt and his assistant who conducted the two sales have given

No. 8. Judgment of the District Court. 7-12-49. —*continued.*

evidence. The first sale proved abortive as the purchaser failed to pay the purchase price. The value of the goods according to the contract is Rs. 25,742.72. The amount realised at the sale held by public auction at the risk of the defendants realised Rs. 15,052.84. Customs duty paid by the plaintiff came to Rs. 2,804.11. Customs extra rent and dues came to Rs. 126, landing charges Rs. 77.07. Thus giving defendants credit in a sum of Rs. 15,052.84 cents the balance due came to Rs. 13,697.06 which is now claimed by the plaintiff in this suit. It is now conceded by the defence that in terms of the c.i.f. contract the plaintiff has performed its part of the contract by shipping the goods at the port of origin before the end of January, 1948. Various points were raised by learned Counsel for the defendants. One of the points raised by him was that plaintiff Company were commission agents, but I do not think one need seriously consider that point because plaintiff agreed to sell the goods at a fixed price, that is to say, at the rate of 40*d.* per yard c.i.f. Colombo. Plaintiff had to bear the cost insurance and freight. If the plaintiff Company were merely commission agents then the variations in price would not have affected the plaintiff in any manner for plaintiff would have been only entitled to a certain percentage as commission, but in this particular case plaintiff had agreed to sell according to the agreement, P 8, not on a commission basis but for a fixed price. Although 300 pieces of 42 inches by about 40 yards were agreed to be sold as a matter of fact only 291 pieces arrived, but the defendants at no stage repudiated the contract on the ground of shortage of the quantity ordered. Contract P 8, clause 12 provides thus :

> " In the event of the arrival of a lesser quantity of goods than mentioned below, I/we shall not be entitled to reject the same on that ground but shall take delivery of and pay for same on the terms and at the rates specified. In the event of the arrival of a greater quantity of goods than mentioned below, I/we shall not be entitled to reject the whole quantity on that ground but shall have the option of either taking delivery of the whole amount paying a proportionate of price or of rejecting the excess quantity only."

So that the argument about the shortage is effectively met by clause 12 of this agreement. It would appear that this ship the " Laurens Kerk " in which the goods were originally shipped had transhipped the goods to the " Triport " at a certain point of its voyage and the goods were actually brought to the Colombo harbour by the steamer " Triport." That is specifically provided for in the bill of lading– *vide* P 19, clause 16. It runs thus :

> " 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 on carriage in the same or other ship or by any other means of conveyance."

Clause 1 of the contract provides this :

> " Payment to be made in cash on or before the arrival of the goods and I/we shall not be entitled to call for or await tender before payment ; any

giving of credit or acceptance of a promissory note for the amount due to be entirely in your discretion and interest at the rate of—per cent. per annum to be charged by you after the expiration of two days from the receipt of notice of arrival whether credit is allowed or not. Any tender or delivery of the goods or of the bill of lading or of such delivery order or other documents or documents as will enable me/us to obtain possession of the goods shall in every case constitute a valid tender or delivery. You are not responsible through the late arrival or non arrival of documents."

This clause makes provision for delivery of documents to enable defendants to take delivery of the goods. The point was made that no policy of insurance was tendered by the plaintiff to the defendants. As a matter of fact it was never the case for the defendants that they refused to take delivery of the goods and pay for same because the plaintiff had failed to tender to the defendants a policy of insurance covering the goods ordered. That point was not specifically taken in the answer and no specific issue was raised. As a matter of fact according to the evidence of the plaintiff I find that the policy of insurance was not in fact tendered by the plaintiff to the defendants. Some mishap appears to have happened to the steamer " Laurens Kerk " while on its way to Colombo which necessitated the transhipment. Plaintiff's witness Mr. Perera states that he was called upon to send the policy of insurance and he accordingly forwarded the policy of insurance to a third party. I have been referred to *Heyman & Another vs. Darwins Ltd.*, *L.R. House of Lords* (1942), 356. At page 361 the following has been laid down :

" In 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 which excuses or puts an end to further performance; a classic example of this is to be found in *Avery vs. Bowden.* (2) Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) "accept the repudiation" by so acting as to make plain that in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages. Recission (expect by mutual consent or by a competent Court) said Lord Sumner in Hirji Mulji *vs.* Cheong Yeu Steamship Company, Limited (3) is the right of one party arising upon conduct by the other by which he intimates his intention to abide by the contract no longer. It is a right the contract is at an end if he does, and to claim damages if it is a total breach, but it is a right in his option."

Defendants by letter of 15th January 1948, P11, had repudiated the contract. So that from the 15th January 1948 defendants had consistently taken up the position that they had repudiated the contract because the goods did not arrive in Ceylon before the 31st of January, 1948, which was undoubtedly the result of their misunderstanding of the stipulations contained in the contract of sale. Although the plaintiff made all efforts to explain to the defendants the true position in law, defendants refused to move one iota from the position they had taken up on the 15th of January, 1948. As far as they were concerned the

No. 8. Judgment of the District Court. 7-12-49 —*continued.*

contract was at an end. If the defendants had not taken up that unequivocal attitude, I dare say the plaintiff would have undoubtedly tendered to them the policy of insurance which covered the goods. Clause 4 of the contract P 8 undoubtedly comes to the rescue of the plaintiff. It runs thus :

> " The goods to be insured against loss and such risk as you may think best for my/our interests and I/we undertake to pay the premiums in respect of such insurance. I/we further agree to bear all loss or damage to the goods which is not recoverable under such insurance. You or your agents or the manufacturers or suppliers of the goods are at liberty to effect the insurance in any manner which you or they may desire including insurance under a policy covering other goods not belonging to me/us and insurance under a floating policy. Notwithstanding that the price of the goods may be expressed to be fixed on c.i.f. or equivalent terms. I/we shall not be entitled to demand nor shall you be bound to tender or deliver to me/us any insurance policy, bill of lading, invoice or other document or documents whatsoever but any such tender or delivery as described in clause 1 hereof shall be a good and valid tender or delivery."

I am satisfied that the defendants have committed a breach of the contract and that they are liable to pay the damages claimed.

I answer the issues as follows :—

(1) Yes.
(2) Yes.
(3) Yes.
(4) Yes.
(5) Rs. 13,697.06.
(6) Yes.
(7) Does not arise in view of my answer to issue 6.
(8) Yes.
(9) Does not arise in view of my answer to issue 8.
(10) Plaintiff Company intimated that all the goods had arrived.
(11) Yes.
(12) No.

I give judgment for plaintiff in a sum of Rs. 13,697.06 together with legal interest thereon from date of plaint until payment. Defendants will pay the plaintiff the costs of this suit. Enter decree accordingly.

Sgd. H. A. DE SILVA,
District Judge.

Judgment pronounced in open Court in the presence of Mr. Billimoria for the plaintiff and Mr. Kanagarajah for the defendants.

Sgd. S. J. C. SCHOKMAN,
District Judge.

7-12-1949.

No. 9.
Decree of the District Court.

No. 9. Decree of the District Court. 7-12-49.

Decree.

IN THE DISTRICT COURT OF COLOMBO

HOLLAND-COLOMBO TRADING SOCIETY LIMITED, Lloyds Building, Colombo .. .. *Plaintiff.*

No. 20,182/M. *Vs.*

(1) SEGU MOHAMED KHAJA ALAWDEEN,
(2) MOHAMED OWDHU, son of Haja Alawdeen,
(3) MOHAMED LEBBE MARIKAR, son of Haja Alawdeen.
(4) SEGU MOHAMED BUHARI, son of Haja Alawdeen, all carrying on business in partnership under the name, style and firm of "S. S. K. Haja Alawdeen & Sons", at No. 99, Second Cross Street, Pettah, Colombo .. .. *Defendants.*

This action coming on for final disposal before H. A. de Silva, Esquire, District Judge of Colombo, on the 7th day of December, 1949, in the presence of Mr. Adv. S. J. Kadirgamar, instructed by Messrs. Julius & Creasy, Proctors on the part of the plaintiff, and of Mr. Adv. V. A. Kandiah, instructed by Mr. S. Kanagarajah, Proctor, on the part of the defendants ; it is ordered and decreed that the defendants jointly and severally do pay to the plaintiff the sum of Rupees thirteen thousand six hundred and ninety seven and cents six (Rs. 13,697.06) with legal interest thereon from 6th October, 1948, until payment in full and costs of suit.

Sgd. S. J. C. SCHOKMAN,
District Judge.

The 7th day of December, 1949.

No. 10.
Petition of Appeal to the Supreme Court.

No. 10. Petition of Appeal to the Supreme Court. 7-12-49.

(1) SEGU MOHAMED KHAJA ALAWDEEN,
(2) MOHAMED OWDHU,
(3) MOHAMED LEBBE MARIKAR, and
(4) SEGU MOHAMED BUHARI .... *Defendants-Appellants.*

Vs.

HOLLAND-COLOMBO TRADING SOCIETY LIMITED, Colombo ... . *Plaintiff-Respondent.*

This 7th day of December, 1949.

No. 10. Petition of Appeal to the Supreme Court. 7-12-49. —*continued.*

To His Lordship the Chief Justice and other Judges of the Supreme Court of the Dominion of Ceylon.

The petition of appeal of the defendants-appellants abovenamed appearing by Mr. S. Kanagarajah, their Proctor, states as follows :—

1. The plaintiff-respondent sued the defendants-appellants for the recovery of damages alleged to have been sustained by them as a result of the defendants' failure to accept goods in terms of a contract for the sale of goods.

2. The defendants-appellants denied that there was any such contract or contracts for the sale of goods as pleaded in the plaint, and pleaded that the alleged contract did not satisfy the requirements of section 5 of the Sale of Goods Ordinance and that the plaint did not disclose a cause of action against the defendants.

3. The case was taken up for trial on 22–9–49 and on the adjourned dates on 12 issues.

4. The learned District Judge by his order and judgment of even date entered judgment for plaintiff as prayed for with costs.

5. Being aggrieved with the said judgment and order, the defendants-appellants appeal to Your Lordships' Court on the following among other grounds that may be urged by Counsel at the hearing :

(*a*) That the said judgment is contrary to law and the evidence led in the said case.

(*b*) The learned District Judge had it is respectfully submitted, erred in accepting the indent as a note or memorandum within the meaning of the Sale of Goods Ordinance. The indent is a contract of agency and nothing more.

(*c*) The plaintiff did not come into Court on the basis of the indent but pleaded a contract of sale, which at no time existed. The learned District Judge should have tried issues 6 to 9 as preliminary issues and should have in any event answered those issues in favour of appellants.

(*d*) The plaintiff came into Court on the basis of a c.i.f. contract of sale ; the plaintiff on a c.i.f. contract of sale should have tendered shipping documents including policy of insurance ; the plaintiff not having tendered same is not entitled to enforce its claim for damages.

(*e*) The plaintiff did not allege or plead in the plaint that shipping documents including the policy of insurance was tendered to defendants and issue No. 8 should have been answered in favour of defendants.

(*f*) The invoice and all other documents clearly prove that the consignee was the "Colombo Branch" of the plaintiff Company the defendants were justified in rejecting the goods or documents.

(*g*) The alleged contract provided for time of shipment and the plaint not having referred to same, the learned Judge should have answered issue No. 6 in favour of the defendants-appellants.

(*h*) The goods were delivered and sold by Holland-Colombo Ltd., and all amounts were paid by them and the defendants were debited with the amount claimed in their books of account.

(*i*) The Colombo branch ceased to exist on 1st April, 1948, and the plaintiff had no status to maintain this action.

(*j*) The plaintiff did not plead that shipment was in January nor did plaintiff explain undue delay in arrival of ship ; there was deviation in the ship. The defendants were justified in rejecting the goods.

(*k*) The plaintiff was liable as an agent for breach of duty.

(*l*) The damages claimed in any event are excessive.

Wherefore the appellants pray that Your Lordship's Court be pleased to set aside the judgment and to enter judgment dismissing plaintiff's action with costs and for such other and further relief as to this Court shall seem meet.

Sgd. S. KANAGARAJAH,
Proctor for Defendants-Appellants

No. 11.
Judgment of the Supreme Court.

S.C. 311-M. D.C., Colombo, 20,182-M.

S. M. K. ALAWDEEN and three others ... .. *Defendants-Appellants.*

Vs.

HOLLAND-COLOMBO TRADING SOCIETY LTD.
.... *Plaintiff-Respondent.*

No. 11. Judgment of the Supreme Court. 18-8-52. —*continued.*

Present : GRATIAEN, J. & GUNASEKERA, J.

Counsel : 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.

Argued on : 31st July & 1st August, 1952.
Decided on 18th August, 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 (P 8) 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 to the proposed contract. The offer contained in P 8 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 P 8. 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 or any of the other 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 expressed to be " cash against documents ", the meaning of which expression has been explained and qualified in clauses (1) and (4) of P 8, 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 to 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 invoiced 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 amont 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 P 8. 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 P 8, 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 vs. 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 have been entitled to demand contemporaneous payment of the contract price from the sellers together with landing charges, Customs dues, etc., 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*,

No. 11.
Judgment of the Supreme Court.
18-8-52.
—*continued.*

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 P 19. All the terms of this bill of lading do not appear in the type-written brief 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 on carriage 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, P 19, was received by the plaintiffs in Colombo in due course, and on 26th February, 1948, they wrote the letter P 16 to the defendants in the following terms :—

" Dear Sirs,

INDENT NO. HCTS/85

300 *Pieces 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. 13,096 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 P 17 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 P 19, duly indorsed, to the plaintiffs upon payment of the price constituted at that time a valid tender within the meaning of the contract. It therefore 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 *Heyman vs. Darwins Ltd.* (2) 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 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 vs. Knight.* (3) In the result, the plaintiffs are precluded from now maintaining a cause of action based on the defendants' original refusal to accept the tender of P 19 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 P 19. On each occasion, notwithstanding the defendants' wrongful breach of the contract, the plaintiffs elected to treat the contract as being still in operation.

No. 11. Judgment of the Supreme Court. 18-8-52. —*continued.*

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 transhipped to another steamer, ss. " Triport ", for on carriage to the port of Colombo. Such transhipment was admittedly authorised by the contract of affreightment contained in the original bill of lading P 19, 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. 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 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 as " 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 P 13 dated 12th April, 1948, addressed to the defendants :—

" Dear Sirs,

INDENT NO. HCTS/85

Six 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 P 19, *which was admittedly the only document, apart from the 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 P 8 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 P 19 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 the provisions of clause 1) 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 P 19 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.

No. 11. Judgment of the Supreme Court. 18-8-52. —*continued.*

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 P 19 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 would 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 vs. Macdonald.* (4) But in the present case P 19 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 P 19 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 P 19, 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 P 19 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 P 19, 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 vs. Oakes.* (5) 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 thr 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 that time." per Lord Summer in *Hansonn vs. Hamel and Horley.* (5A)

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 P 19 in April, 1948, to the defendants 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.

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 ship-owner 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 vs. Blythe.* (6) As Bankes, L.J., asid in *Hansson vs. Hamel and Horley Ltd.* (7) 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 ship-owner who carries the goods should the goods be damaged or not delivered."

The bill of lading P 19 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 owners of ss. " Laurenskerk ", but on the face of the document there is nothing to indicate that the bare production of P 19, 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 P 19 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.

No. 11. Judgment of the Supreme Court. 18-8-52. —*continued.*

" The documents tendered must be valid and effective at the time of the tender ", (8) 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 P 19 or by any other evidence which might have been admissible for the purpose, that the bill of lading P 19 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, 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 P 19. 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 defendants 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 P 19 alone. *Prima facie*, P 19 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 " (5A)

I have given careful consideration to the question whether justice requires that we should send the case back for a re-trial so as to enable the plaintiffs to lead further evidence, if available, on the specific issue as to whether the tender of P 19 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 P 8. 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. 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.

(1) (1934) 2 K.B. 394
(2) (1942) A.C. 356
(3) (1872) L.R. 7 Exch. 111 at p. 112
(4) 6 Man and G. 593 = 134 E.R. 1029 at p. 1036
(5) (1922) 38 T.L.R. 349 at p. 351 and 38 T.L.R. 517 A.C.
(5A) (1922) 2 A.C. 36
(6) 1 K.B. 495 at p. 514
(7) (1922) 91 L.J.K.B. 65
(8) Kennedy on C.I.F. Contracts (2nd Ed.) at Page 115

Sgd. E. F. N. GRATIAEN.
Puisne Justice.

GUNASEKARA, J.—I agree.

Sgd. E. H. T. GUNASEKARA.
Puisne Justice.

No. 12.
Decree of the Supreme Court.

ELIZABETH THE SECOND, QUEEN OF CEYLON.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

HOLLAND-COLOMBO TRADING SOCIETY LIMITED,
Colombo ... ... *Plaintiff-Respondent.*

Against

(1) SEGU MOHAMED KHAJA ALAWDEEN and 3 Others .. .. *Defendants-Appellants.*

Action No. 20,182/M. District Court of Colombo.

This cause coming on for hearing and determination on the 31st July and 1st and 18th days of August, 1952, and on this day, upon an appeal preferred by the defendants-appellants before the Hon. Mr. E. F. N. Gratiaen, Q.C., Puisne Justice, and the Hon. Mr. E. H. T. Gunasekara, Puisne Justice of this Court, in the presence of Counsel for the defendants-appellants and plaintiff-respondent.

It is considered and adjudged that the judgment under appeal be and the same is hereby set aside and the plaintiffs' action is dismissed with costs both here and in the Court below.

No. 12. Decree of the Supreme Court 18-8-52. —*continued.*

Witness the Hon. Sir Alan Edward Percival Rose, Kt., Q.C., Chief Justice, at Colombo, the Twenty-fifth day of August, in the year of our Lord One thousand Nine hundred and Fifty-two, and of Our Reign the First.

Sgd. W. G. WOUTERSZ,
Deputy Registrar, S.C.

No. 13. Application for Conditional Leave to Appeal to the Privy Council. 9-9-52.

No. 13.

Application for Conditional Leave to Appeal to the Privy Council.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

S.C. No. 311 of 1950 (Final)
D.C., Colombo, No. 20,182/M.

In the matter of an application for Conditional Leave to appeal under the Provisions of the Appeals (Privy Council) Ordinance (Chapter 85).

HOLLAND-COLOMBO TRADING SOCIETY LIMITED, Lloyds Building, Colombo, Petitioner .. .. (*Plaintiff-Respondent.*)

Vs.

(1) SEGU MOHAMED KHAJA ALAWDEEN,
(2) MOHAMED OWDHU, son of Haja Alawdeen,
(3) MOHAMED LEBBE MARIKAR, son of Haja Alawdeen,
and
(4) SEGU MOHAMED BUHARI, son of Haja Alawdeen,
all carrying on business in partnership under the name, style and firm of "S. S. K. Haja Alawdeen & Sons," at No. 99, Second Cross Street, Pettah, Colombo, respondents .. .. (*Defendants-Appellants.*)

To—

THE HON'BLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF THE HON'BLE THE SUPREME COURT OF THE ISLAND OF CEYLON.

The petition of the petitioner abovenamed appearing by Geoffrey Thomas Hale, Frederick Claude Rowan, Joseph Francis Martyn, Henric Theodore Perera, James Arelupar Naidoo and Alexander Richard Neville de Fonseka, carrying on business in partnership in Colombo, under the name, style and firm of Julius & Creasy, and their assistants, Alexander Nereus Wiratunga, Lena Charlotte Fernando, Mohamed Shereeff Mohamed Shabdeen, Rex Herbert Sebastian Phillips, Reginald Frederick Mirando, William Henry Senanayake, and Francis Luke Theodore Martyn, Proctors, states as follows :—

1. That feeling aggrieved by the judgment and decree of this Court pronounced on 18th day of August, 1952, the said petitioner abovenamed is desirous of appealing therefrom to Her Majesty the Queen in Council.

2. The said judgment is a final judgment and the matter in dispute on the appeal is far in excess of the value of Rupees Five-thousand (Rs. 5,000) and involves directly or indirectly some claim, or question to or respecting property

No. 13. Application for Conditional Leave to Appeal to the Privy Council. 9-9-52. —*continued.*

or some civil right amounting to or in excess of the value of Rupees Five-thousand (Rs. 5,000). The questions involved in the appeal are questions which by reason of their great general or public importance or otherwise ought to be submitted to Her Majesty the Queen in Council for decision.

3. That notices of the intended application for leave to appeal were served on the respondents in terms of Rule (2) of the Rules in the Schedule to the Appeals (Privy Council) Ordinance on the 23rd, 25th, 27th and 31st days of August, 1952, by sending notices to the respondents abovenamed by—

(*a*) Registered Post,
(*b*) Ordinary Post,
(*c*) Personal Service,
(*d*) Personal Service through the Fiscal, Western Province.

Wherefore the petitioner prays that Your Lordships' Court be pleased to grant it Conditional Leave to Appeal against the said judgment and decree of this Court dated the 18th day of August, 1952, to Her Majesty the Queen in Council and for such other and further relief as to Your Lordships' Court shall seem meet.

Sgd. JULIUS & CREASY,
Proctors for Petitioner.

No. 14.

No.14 Decree granting Conditional Leave to appeal to the Privy Council. 24-9-52

Decree Granting Conditional Leave to Appeal to the Privy Council.

ELIZABETH THE SECOND, QUEEN OF CEYLON.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

HOLLAND-COLOMBO TRADING SOCIETY LIMITED,
Lloyds Building, Colombo, petitioner *Plaintiff-Respondent.*

Against

(1) SEGU MOHAMED KHAJA ALAWDEEN,
(2) MOHAMED OWDHU, son of Haja Alawdeen,
(3) MOHAMED LEBBE MARIKAR, son of Haja Alawdeen,
and
(4) SEGU MOHAMED BUHARI, son of Haja Alawdeen, all carrying on business in partnership under the name, style and firm of "S. S. K. Haja Alawdeen & Sons", at No. 99, Second Cross Street, Pettah, Colombo, respondents .. .. *Defendants-Appellants.*

Action No. 20,182/M. (S.C. 311 Final). District Court of Colombo.

In the matter of an application dated 10th September, 1952, for Conditional Leave to Appeal to Her Majesty the Queen in Council by plaintiff-appellant abovenamed against the decree dated 18th August, 1952.

No. 14. Decree granting Conditional Leave to Appeal to the Privy Council. 24-9 52. —*continued.*

This matter coming on for hearing and determination on the 24th day of September, 1952, before the Hon. Mr. E. H. T. Gunasekara, Puisne Justice, and the Hon. Mr. V L. St. C. Swan, Puisne Justice of this Court, in the presence of Counsel for the appellant and respondents.

It is considered and adjudged that this application be and the same is hereby allowed upon the condition that the applicant do within one month from this date—

(1) Deposit with the Registrar of the Supreme Court a sum of Rs. 3,000 and hypothecate the same by bond or such other security as the Court in terms of section 7 (1) of the Appellate Procedure (Privy Council) Order shall on application made after due notice to the other side approve.

(2) Deposit in terms of provisions of section 8 (*a*) of the Appellate Procedure (Privy Council) Order with the Registrar a sum of Rs. 300 in respect of fees mentioned in section 4 (*b*) and (*c*) of Ordinance No. 31 of 1909 (Chapter 85).

Provided that the applicant may apply in writing to the said Registrar stating whether he intends to print the record or any part thereof in Ceylon, for an estimate or such amounts and fees and thereafter deposit the estimated sum with the said Registrar.

Witness the Hon. Sir Alan Edward Percival Rose, KT., Q.C., Chief Justice at Colombo, the 29th day of September, in the year of our Lord One thousand Nine hundred and Fifty-two, and of Our Reign the First.

Sgd. W. G. WOUTERSZ,
Deputy Registrar, S.C.

No. 15. Application for Final Leave to Appeal to the Privy Council. 14-10-52

No. 15
Application for Final Leave to Appeal to the Privy Council.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

HOLLAND-COLOMBO TRADING SOCIETY LIMITED,
Colombo .. .. *Plaintiff.*

S.C. No. 311 of 1950 (Final) *Vs.*

(1) SEGU MOHAMED KHAJA ALAWDEEN,
(2) MOHAMED OWDHU, son of Haja Alawdeen,
(3) MOHAMED LEBBE MARIKAR, son of Haja Alawdeen, and
(4) SEGU MOHAMED BUHARI, son of Haja Alawdeen, all carrying on business in partnership under the name, style and firm of " S. S. K. Haja Alawdeen & Sons ", at No. 99, Second Cross Street, Pettah, Colombo .. .. *Defendants.*

No. 15. Application for Final leave to Appeal to the Privy Council. 14-10-52 —*continued.*

(1) SEGU MOHAMED KHAJA ALAWDEEN,
(2) MOHAMED OWDHU, son of Haja Alawdeen,
(3) MOHAMED LEBBE MARIKAR, son of Haja Alawdeen, and
(4) SEGU MOHAMED BUHARI, son of Haja Alawdeen, all carrying on business in partnership under the name, style and firm of " S. S. K. Haja Alawdeen & Sons ", at No. 99, Second Cross Street, Pettah, Colombo *Defendants-Appellants*

D.C. Colombo, No. 20,182/M. *Vs.*

HOLLAND-COLOMBO TRADING SOCIETY LIMITED,
Colombo .. .. .. *Plaintiff-Respondent.*

HOLLAND COLOMBO TRADING SOCIETY LIMITED,
Colombo. .. .. *Appellant.*

Vs.

(1) SEGU MOHAMED KHAJA ALAWDEEN,
(2) MOHAMED OWDHU, son of Haja Alawdeen,
(3) MOHAMED LEBBE MARIKAR, son of Haja Alawdeen, and
(4) SEGU MOHAMED BUHARI, son of Haja Alawdeen, all carrying on business in partnership under the name, style and firm of " S. S. K. Haja Alawdeen & Sons ", at No. 99, Second Cross Street, Pettah, Colombo .. ... *Respondents.*

To—

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF THE HONOURABLE THE SUPREME COURT OF THE ISLAND OF CEYLON.

On this 14th day of October, 1952.

The humble petition of the plaintiff in District Court, Colombo, No. 20,132/M, plaintiff-respondent in Supreme Court, No. 311 of 1950 (Final) and appellant abovenamed appearing by Geoffrey Thomas Hale, Frederick Claude Rowan, Joseph Francis Martyn, Henric Theodore Perera, James Arelupar Naidoo, and Alexander Richard Neville de Fonseka, carrying on business in partnership in Colombo, under the name, style and firm of Julius & Creasy, and their assistants, Alexander Nereus Wiratunga, Lena Charlotte Fernando, Mohamed Shereeff Mohamed Shabdeen, Rex Herbert Sebastian Phillips, Reginald Frederick Mirando, William Henry Senanayake, and Francis Luke Theodore Martyn, Proctors, states as follows :—

1. That the plaintiff in District Court Colombo, No. 20,182/M, plaintiff-respondent in Supreme Court No. 311 of 1950 (Final) and appellant abovenamed on the 24th day of September 1952 obtained Conditional Leave from this Honourable Court to appeal to Her Majesty the Queen in Council against the judgment of this Court pronounced on the 18th day of August 1952.

No. 15. Application for Final Leave to Appeal to the Privy Council. 14-10-52. —continued.

2. That the plaintiff in District Court, Colombo, No. 20,182/M, plaintiff-respondent in Supreme Court No. 311 of 1950 (Final) and appellant abovenamed has in compliance with the conditions on which such leave was granted deposited with the Registrar of this Court a sum of Rs. 3,000 on the 14th day of October 1952 and has by bond dated the 14th day of October 1952 mortgaged and hypothecated the said sum of Rs. 3,000 with the said Registrar.

3. The plaintiff in District Court, Colombo, No. 20,182/M plaintiff- respondent in Supreme Court No. 311 of 1950 (Final) and appellant abovenamed has further deposited with the said Registrar a sum of Rs. 300 in respect of fees.

Wherefore the plaintiff in District Court, Colombo No. 20,182/M, plaintiff-respondent in Supreme Court No. 311 of 1950 (Final) and appellant abovenamed prays that it be granted final leave to appeal against the said judgment of this Court dated the 18th day of August 1952 to Her Majesty the Queen in Council, and for such other and further relief in the premises as to Your Lordships' Court shall seem meet. 10

Sgd. JULIUS & CREASY,
Proctors for Plaintiff in D.C., Colombo, No. 20,182/M, Plaintiff-Respondent in S.C. No. 311 of 1950 (Final) and Appellant to this Application. 20

No. 16. Decree granting Final Leave to appeal to the Privy Council. 21-10-52.

No. 16.
Decree Granting Final Leave to Appeal to the Privy Council.

ELIZABETH THE SECOND, QUEEN OF CEYLON.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

HOLLAND-COLOMBO TRADING SOCIETY LIMITED,
Lloyds' Building, Colombo, petitioner ... . *Plaintiff-Respondent.*

Against

(1) SEGU MOHAMED KHAJA ALAWDEEN,
(2) MOHAMED OWDHU, son of Haja Alawdeen,
(3) MOHAMED LEBBE MARIKAR, son of Haja Alawdeen, and 30
(4) SEGU MOHAMED BUHARI, son of Haja Alawdeen,
all carrying on business in partnership under the name, style and firm of " S. S. K. Haja Alawdeen & Sons ", at No. 99, Second Cross Street, Pettah, Colombo, respondents . ... *Defendants-Appellants.*

Action No. 20,182/M. (S.C 311 Final). District Court of Colombo.

No. 16. Decree Granting Final Leave to appeal to the Privy Council. 21-10-52. —*continued.*

In the matter of an application by the plaintiff above-named dated 15th October, 1952, for Final Leave to appeal to Her Majesty the Queen in Council against the decree of this Court dated 18th August, 1952.

This matter coming on for hearing and determination on the 21st day of October, 1952, before the Hon. Mr. M. F. S. Pulle, Q.C., Puisne Justice, and the Hon. Mr. L. M. D. de Silva, Q.C., Puisne Justice of this Court, in the presence of Counsel for the applicants and respondents.

The applicants having compiled with the conditions imposed on them by the Order of this Court dated 24th September, 1952, granting Conditional Leave to Appeal.

It is considered and adjudged that the applicants' application for Final Leave to Appeal to Her Majesty the Queen in Council be and the same is hereby allowed.

Witness the Hon. Mr. M. F. S. Pulle, Q.C., Pusine Justice at Colombo, the 27th day of October, in the year of our Lord One thousand Nine hundred and Fifty-two, and of Our Reign the First.

Sgd. W. G. WOUTERSZ,
Deputy Registrar, S.C.

Exhibits.

P 6.
Copy of Registration of Plaintiff Company. 10-11-36.

PART II

EXHIBITS

P 6.

Copy of Registration of Plaintiff Company.

"P 6"

Copy Application No. 4,367 of 15-9-49

REGISTER OF COMPANIES INCORPORATED OUTSIDE CEYLON AND HAVING PLACES OF BUSINESS IN THE ISLAND

Application No. Entry No. 582.
Name of Company : Holland-Colombo Trading Society Limited.
Place of Incorporation : United Kingdom.
Local Agents, and Place of Business : Gerard Johan Van Hoolwerff, Edward William Olink, Dirk Gerardus Degenhart, Lloyd's Buildings, Prince Street, Colombo

Document.	Date of Receipt.	Registrar or Assistant Registrar.
A.—Certified copy of the Memorandum and Articles of the Company	10th November, 1936	—
B.—List containing the names, addresses, occupations, and nationalities of the persons who are the Directors of the Company	10th November, 1936	— Sgd. Chas. M. Agalawatta Asst. Registrar 17-11-36
C.—List containing the name and addresses of persons resident in the Island authorized to accept service of process, &c.	10th November, 1936	—

True Copy :

Sgd. (Illegibly)
Asst. Registrar of Companies.

Colombo, 15th September, 1949.

Exhibits.

P 8
Indent No.
HCTS/85.
5-9-47.

P 8.

Indent No. HCTS/85.

P 8.

DESCRIPTION OF GOODS.

Indent No. HCTS/85

Commodity : 300 pieces 42 inches × about 40 yards White Shirtings (Dutch) "Lucinde."
Price : 40*d*. per yard c.i.f. Colombo.
Payment : Cash against documents.
Shipment : October/in one lot, January; 1948.
Licence : Against Dealers Textile Licence No. 914/C 914.
H.C.T.S.
Marks : S.S.K.H.A.
& SONS
COLOMBO

S. S. K. Haja Alawdeen & Sons,
Sgd. (Illegibly)
Partner.

To Messrs. HOLLAND-COLOMBO TRADING SOCIETY, LIMITED.
COLOMBO

Dear Sirs,

I/we the undersigned of Messrs. S. S. K. Hadji Alawdeen & Sons, 99, Second Cross Street, Colombo, hereby request you to order and import for me/us on my/our account and risk the whole or any part of the goods described in the reverse hereof on the following terms, and I/we agree to take delivery of the goods, or of such part as may be delivered from the vessel or vessels, on arrival and to pay you the price mentioned together with your commission of — per cent. and all freight, dues, customs duties, landing, warehouse and other customary charges.

1. Payment to be made in cash on or before arrival of the goods and I/we shall not be entitled to call for or await tender before payment ; any giving of credit or acceptance of a promissory note for the amount due to be entirely in your discretion and interest at the rate of — per cent. per annum to be charged by you after the expiration of two days from the receipt of notice of arrival

Exhibits.

P 8.
Indent No. HCTS 85. 5-9-47.
—*continued.*

whether credit is allowed or not. 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 me/us to obtain possession of the goods shall in every case constitute a valid tender or delivery. You are not responsible for loss sustained through the late arrival or non arrival of documents.

2. On receiving notice from you that the goods or any part of them have arrived, I/we shall remove the same from the ship or wharf or your store or any place named by you within two days of such notice at my/our expense and risk and I/we shall pay all customs duties, dues, landing, warehouse and other customary charges. On all goods of which delivery is not taken within such time I/we shall pay insurance at a rate of not less than 1/4th per cent. and godown rent at the rate ruling for bonded warehouses.

3. For purposes of converting the sterling amount, payable by me/us in respect of this indent, into rupees the bank T.T. selling rate of exchange on London at the commencement of business on the day the goods arrive in Colombo Harbour will be taken, or such other rate as may have been previously booked by you at my/our written request. In the event of the goods arriving after twelve noon, the Banks T.T. selling rate of exchange on London at the commencement of business on the following day will be taken unless the exchange has been previously booked at my/our written request.

4. The goods to be insured against loss and such risks as you may think best for my/our interest and I/we undertake to pay the premiums in respect of such insurance. I/we further agree to bear all loss or damage to the goods which is not recoverable under such insurance. You or your agents or the manufacturers or suppliers of the goods are at liberty to effect the insurance in any manner which you or they may desire including insurance under a policy covering other goods not belonging to me/us and insurance under a floating policy. Notwithstanding that the price of the goods may be expressed to be fixed on c.i.f. or equivalent terms, I/we shall not be entitled to demand nor shall you be bound to tender or deliver to me/us any insurance policy, bill of lading, invoice or other document or documents whatsoever but any such tender or delivery as described in clause 1 hereof shall be a good and valid tender or delivery. In the event of my/our suffering loss recoverable from the insurer, you shall be at liberty either to deliver to me/us a policy under which the goods are insured or to claim the amount of the loss from the insurer on my/our behalf.

5. When the goods are ordered from specified manufacturers or suppliers I/we agree that neither you nor your agents will be held responsible for wrongful execution of this contract by such manufacturers or suppliers.

6. If the price stated is to include duty, I/we shall bear any increase of the Customs tariff imposed after the date hereof.

7. The weight or measurement of the goods as specified in the shippers invoice shall be accepted by me/us as the correct weight or measurement thereof and the goods shall be paid for on that basis, any loss or deficiency in weight or measurement being borne by me/us.

8. Each shipment and/or separate item to be regarded as a separate order.

9. You are not responsible for any errors caused by mutilated telegrams.

10. If the goods are not ready for shipment on the terms herein contained I/we shall be at liberty to cancel or allow later shipment but on no account shall I/we be entitled to compensation for late delivery or non delivery from this or any other cause whatsoever. Receipts of carriers to whom the goods are delivered, or dock receipts or bills of lading to be taken as conclusive proof of shipment and the date appearing in the bill of lading or shipping receipt to be conclusive proof of the date of shipment. Should shipment or clearance be prevented or delayed by reason of *Force Majeure* or by carriage for the goods not being available or by their being shut out from the ship for which they were intended or owing to Government action, war, siege, blockade, riots, quarantines, strikes, or lock-outs at port or ports of lading or to the loading port or ports being declared plague infected or to non-arrival or late arrival of tonnage at port or ports of loading caused by any of the above mentioned contingencies at other ports of accidents or loss during sea and/or land transport, ice blockade, bankruptcy, fire at manufacturers' works, break-down of machinery or by reason of any other cause whatsoever over which you have no control, I/we agree to take delivery of the goods on arrival and fulfil the undertakings herein contained as if no such prevention or delay of shipment or clearence had occurred.

11. The expression " bill of lading " herein shall include any document issued as or purporting to be a bill of lading containing an acknowledgment by the ship owners or their agents of the receipt of the goods whether on board the ship or for shipment or otherwise and whether alone or with other goods.

12. In the event of the arrival of a lesser quantity of goods than mentioned below, I/we shall not be entitled to reject the same on that ground but shall take delivery of and pay for the same on the terms and at the rate or rates specified. In the event of the arrival of a greater quantity of goods than mentioned below,

Exhibits.

P 8.
Indent No. HCTS/85. 5-9-47.
—*continued.*

I/we shall not be entitled to reject the whole quantity on that ground but shall have the option of either taking delivery of the whole amount paying a proportionate increase of price, or of rejecting the excess quantity only.

13. I/we cannot take any objection to or make any claim in respect of the goods unless the objection or claim is lodged with you in writing before removal and not later than three days after receipt of the notice mentioned in clause two hereof or if the objection or claim arises from condition of the goods discoverable only after removal and inspection, then not later than ten days after removal or after receipt of such notice which ever shall be the earlier. In no case can I/we refuse payment or make any objection or claim before arbitators or in a Court of law or otherwise on any ground not stated in such writing or in a written notice lodged with you within ten days from the date of removal or receipt of the notice mentioned in clause two which ever shall be the earlier.

14. Should I/we fail to fulfil either wholly or in part in any way, or dispute or fail to comply with, any of the terms or conditions hereof, I/we authorise you at any time in your discretion, to dispose of the documents or goods or any part of them by private sale or public auction on my/our account and risk, and I/we hereby bind myself/ourselves to make good any loss or deficiency that may arise from such sale and to pay all expenses together with brokerage and interest at — per cent per annum waiving all claims to any advantage thereon, and I/we agree to accept your account sales for those of the auctioneer as correct and to consent to the same being used, if necessary, by you or your agents in any Court of law against me/us without further proof. Besides you or your agents shall in any such case be at liberty to stop delivery or shipment of any goods under this or any other contract, and I/we further bind myself/ourselves to pay to you the amount of any loss or damage incurred by reason of your having procured or taken steps to procure any such goods and agree to accept as conclusive and binding on me/us for all purposes the determination of the amount of such loss or damage as shall be made by the Chamber of Commerce of the district or locality where such loss or damage shall have arisen if the same shall have arisen in the United Kingdom of Great Britain and Ireland or a British colony, and if elsewhere by the British Consul or someone nominated in that behalf by him of the place where such loss or damage shall have arisen. I/we agree that the Certificate of Award so given by such Chamber of Commerce or Consul or his nominee shall be evidence of such determination and shall be receivable in evidence in all proceedings against me/us without further proof.

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P 8.
Indent No. HCTS)85.
5-9-47.
—*continued.*

15. Should you not choose to exercise your right to sell as provided for in the preceding clause, the goods shall be detained at my/our risk and I/we shall pay warehouse rent, fire insurance and all other customary mercantile charges with interest at — per centum per annum, and I/we shall not be entitled to compensation for short deliveries or for any defect or damage.

16. If any dispute should arise as to the quantity, quality, condition, marking, packing, yardage, or other description whatsoever of the goods, it is agreed that the same shall be referred to the arbitration of two merchants from the list of qualified surveyors nominated by the Ceylon Chamber of Commerce, one to be named by each party, with liberty to them to appoint an umpire ; and in case of neglect or refusal of either party to name an arbitrator within three days when called upon by the other party in writing, the other to appoint both, the decision of such arbitrators or of their umpire to be final and binding without appeal. No difference of quantity, quality, condition, marking, packing, yardage or other description whatsoever shall entitle me/us to repudiate liability but such difference, if any shall be settled by an allowance for any proved inferiority in the value of the goods arising from such difference, such allowance to be settled by the arbitrators or umpire as the case may be. The arbitrators to state by whom the cost of the arbitration is to be paid.

17. The word " cost " and the word " price " herein shall mean the cost or price at which you undertake or are requested to import the goods for me/us and not the cost of price for which you may purchase or arrange for the purchase of them or the amount which you may be charged for them, with regard to which you are at liberty to make any arrangement which you please without prejudice to your right to the full commission herein stated.

18. If the goods have been ordered by cable before the date hereof at my/our request the copies of the cable in your books or files shall constitute the record of the goods ordered and the particulars of the order and any variation contained herein shall be subject to the manufacturers or suppliers being willing to make the variation, otherwise this indent shall be read as if the goods and particulars stated in such cables were the goods and particulars stated below.

(19) I/we undertake to give you full and practicable instructions where such are necessary as to get up, stamping, assortments, packing, etc., immediately on being called upon so to do, otherwise you may add any delay thus caused to the time originally stipulated for shipment, and I/we agree to make good to

Exhibits.

P 8.
Indent No. HCTS/85.
5-9-47.
—*continued.*

you any loss to which you may be put by my/our delaying to give such instructions. Should I/we fail to give such instructions within a reasonable time you are at liberty to use your own discretion in these matters.

(20) I/we do not hold you responsible for any claim regarding the execution hereof, but it is agreed that if any claim is presented to you in writing within the time specified in the clause 13 you will act on my/our behalf to endeavour to obtain a satisfactory settlement for me/us from the manufacturers or suppliers.

(21) Should the goods be shipped before the time stipulated, I/we agree to either accept the same and pay for them as agreed subject to an allowance for interest at the rate of one per cent per annum over the ruling Bank rate for the period between the actual shipment, and the time stipulated for shipment, or take delivery within contracted shipment time at our option.

(22) Nothing written on this in any other language than English except my/our signature to be part hereof or to affect the terms and conditions herein contained I/we agree to be bound by the terms and conditions herein contained.

(23) All notices hereby required shall be in writing and any such notice shall be deemed to have been duly given if delivered at the address mentioned above or posted to such address under registered cover in which case the notice shall be deemed to have been given on the day after such posting.

Colombo, 5th September, 1947. (Signature)

P 7.
Letter from Defendant to Plaintiff.
23-9-47.

P 7.

Letter from Defendant to Plaintiff.

"P 7"

786

Licence No. 914/C-914

S. S. K. Haja Alawdeen & Sons,
Piece Goods Merchants and Importers.
99, Second Cross Street,
Colombo,

Colombo,
23rd September, 1947.

To The Manager,
The Holland-Colombo Trading Society, Ltd.,
Colombo.

Indent No. HCTS/85—300 Pieces White Shirtings.

Exhibits.

P 7.
Letter from Defendant to Plaintiff.
23-9-47.
—*continued.*

Dear Sirs,

With reference to the above indent we shall be glad to know whether the order has now been confirmed by your principals, if so please send us the confirmation and oblige.

Thanking you,

Yours faithfully

Sgd. S. S. K. HAJA ALAWDEEN & SONS,

Sgd. .. . ...,
Partner.

P 9.
Letter from Plaintiff to Defendants.

P 9.
Letter from Plaintiff to Defendants.
25-9-47.

25th September, 1947.

P 9.

MESSRS. S. S. K. HAJA ALAWDEEN & SONS,
99, 2nd Cross Street, Colombo.

Dear Sirs,

Indent No. 85—300 Pieces White Shirting.

We have pleasure in confirming that your above indent has been confirmed and booked by our principals.

Yours faithfully,

Sgd. (Illegible)

P 10.
Letter from Plaintiff to Defendants.

P 10.
Letter from Plaintiff to Defendants.
15-1-48.

"P 10"

15th January, 1948.

MESSRS. S. S. K. HAJA ALAWDEEN & SONS,
99, Second Cross Street, Colombo

Exhibits.

P 10.
Letter from Plaintiff to Defendants. 15-1-48.
—*continued.*

Indent No. HCTS/85—300 Pieces White Shirtings.

Dear Sirs,

We have received cable advice from our London office that shipment on your above indent will be made in or about two weeks time.

Yours faithfully,
Sgd. (Illegible)

P 11.
Letter from Defendants. to Plaintiff. 15-1-48

P 11.
Letter from Defendants to Plaintiff.

"P 11."

Licence No. 914/C-914.

S. S. K. HAJA ALAWDEEN & SONS,
Piece Goods Merchants and Importers.
99, Second Cross Street,
Colombo.

Colombo,
15th January, 1948.

To MESSRS. HOLLAND-COLOMBO TRADING SOCIETY, LTD.,
P. O. Box 353,
Colombo.

Dear Sirs,

Indent No. HCTS/85.

We are in due receipt of your letter of even date and contents noted.

In this connection we would refer you to the indent in question from which you will observe that this order was originally booked for October-November delivery. However you yourselves altered same in the indent copy and stated "in one lot January" this amendment was made of your own accord but assured us that the goods will be received here before the end of January the latest. According to the present information it is quite clear that we shall not receive these ordered goods within the said stipulated time and as such late delivery is not up to our requirements, we would request you to treat this order as cancelled. Please note that if these goods would arrive at this port later than 31-1-48, we are not liable to accept same.

Thanking you,

Yours faithfully,

Sgd. S. S. K. HAJA ALAWDEEN & SONS,
Partner.

Exhibits.

P. 12.
Letter from Plaintiff to Defendants.
16-1-48.

P 12.
Letter from Plaintiff to Defendants.

"P 12"

16th January, 1948.

MESSRS. S. S. K. HAJA ALAWDEEN & SONS,

99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85

With reference to your letter of the 15th instant, we wish to point out that as agreed and stipulated on the indent, shipment is to be made in January, 1948. Our letter of the 15th instant intimated to you of London's advice of shipment in about two weeks' time, thus fulfilling the contract.

There is no possibility of cancellation at this stage and the shipping documents will be presented to you in due course.

Yours faithfully,

Sgd. (Illegible)

P. 13.
Letter from Defendants to Plaintiff.
17-1-48.

P 13.
Letter from Defendants to Plaintiff.

"P 13"

S. S. K. HAJA ALAWDEEN & SONS,

Piece Goods Merchants and Importers.

99, Second Cross Street, Colombo,

Colombo, 17th January, 1948.

To MESSRS. HOLLAND-COLOMBO TRADING SOCIETY, LTD.,

P. O. Box 353,

Colombo

Exhibits.

P 13.
Letter from Defendants to Plaintiff.
17-1-48.
—*continued*

Dear Sirs,

Indent No. HCTS/85.

With reference to your letter of 16th instant, we maintain that the above order was not executed as promised at the time of booking. As already stated we shall not accept these goods if arrive here after 31–1–48 which please make note.

With regard to the alteration in the indent in respect of the item " delivery " we would inform you that your canvasser misled us and the said alteration was made by himself. If any detailed explanation in this connection would be necessary at a later date we shall prove that our statement is quite in order.

Thanking you,

Yours faithfully,

Sgd. S. S. K. HAJA ALAWDEEN & SONS,

Partner.

P 14.
Letter from Plaintiff to Defendants.
21-1-48.

P 14.
Letter from Plaintiff to Defendants.

" P 14 "

21st January, 1948.

MESSRS. S. S. K. HAJA ALAWDEEN & SONS,

99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85

In reply to your letter of the 17th instant, we regret we are unable to agree with your views. The terms and conditions of the indent, duly signed by you, fully support what we wrote to you in our letter of the 16th instant. We would also point out that there is no such mention as " delivery ", but the indent clearly stipulates " shipment in one lot January, 1948 " We shall be very glad to clarify the position if your representative will call at our office.

Yours faithfully,

Sgd. (Illegible)

P 19.
Bill of Lading.

P 19.

N. V VEREENIGDE NEDERLANDSCHE SCHEEPVAARTMAATSCHAPPIJ
Holland—Bombay—Karachi Lijn
Holland—Bengalen—Burma Lijn

Shipped, in apparent good order and condition, unless otherwise stated hereunder, by Messrs. Holland-Colombo Trading Society Limited, London on board the ms./ss.Laurenskerk at or off the port of Rotterdam with liberty before or after proceeding towards or arriving at the port of discharge to follow any route and to proceed to and stay at any ports or places whatsoever although in a contrary direction to or out of or beyond the customary or advertised route to the port of discharge, once or oftener, in my order, backwards or forwards, even returning to the port of shipment, for loading or discharging cargo or mails, embarking or disembarking passengers, bunkering, or for any purpose whatsoever, whether connected with the present voyage or any intended subsequent voyage and all such ports, places, and sailings to be included within the present voyage —such liberty not to be considered as restricted by any words in the Bill of Lading or by any implication which otherwise might be drawn from this Bill of Lading or from elsewhere—the following goods (contents and condition of contents, measurement, weight, gauge, brand, quality, and value unknown ; any reference in this Bill of Lading to these particulars is for the purpose of calculating freight only), viz. :

/// s 1x ///.....Packages and/or pieces

Marks and Numbers :	No.	Packages Description :	Contents :	Weight in kilos :	Measurement :	Rate	Freight
H. C. T. S.							
S. S. K. H. A. & Sons	6	Bales	White	1295			
Colombo, 7/12			Shirting				
			Freight to be Prepaid		Freight paid		

to be delivered subject to the terms, conditions, and exceptions mentioned in this Bill of Lading, which constitutes the contract of carriage between the Shipper and the N. V. Vereenighde Nederlandsche Scheepvaartmaatschappij, Holland-Bombay-Karachi Lijn/Holland-Bengalen-Burma Lijn (herein called the " Carrier ") at the port of Colombo or so near thereunto as the vessel may safely get and always lie safely afloat at all times of the tide, unto /// order /// or to his or their assigns. In accepting this Bill of Lading the Shipper expressly accepts and agrees to all its terms, conditions, and exceptions, whether printed,

Exhibits.

P 19.
Bill of Lading.
29-1-48
—*continued.*

stamped, or written, or otherwise incorporated, either on the front or on the back. In witness whereof the carrier or his agents have signed two Bills of Lading, all of this tenor and date. One Bill of Lading duly endorsed to be given up in exchange for the goods or for a delivery order for same upon which the others shall stand void.

Party to be notified, but no claim to attach for failure to notify :

MESSRS. HOLLAND-COLOMBO TRADING SOCIETY LTD., COLOMBO.

Dated : Rotterdam, 29th January, 1948.

Sgd. N. V. VEREENIGDE NERDERLANDSCHE SCHEEPVAARTSCHAPPIJ.

Holland-Bombay-Karachi Lijn.

p. p. Holland-Bengalen-Burma Lijn.

Sgd. (Illegible)

29th January, 1948.

AGENTS :

Port Said : L. Savon & Co., Ltd.	Colombo : Aitken, Spence & Co., Ltd.
Suez : L. Savon & Co., Ltd.	Madras : Volkart Bros.
Karachi : Vokart Bros.	Rangoon : Trading Co. late Hegt. & Co., Ltd.
Bombay : Volkart Bros.	
Cochin/Alleppey : Darragh Smail & Co., Ltd., Alleppey	Calcutta : Java-Bengal Line

CONDITIONS OF CARRIAGE

1. *Definitions.*—In this Bill of Lading both on the front or on the back the following expressions have the meanings hereby assigned to them respectively, that is to say—

(*a*) " Carrier " includes the master and the agents of the carrier.

(*b*) " shipper " includes the consignee, the receiver, and the owner of the goods, also the endorsee and the holder of the Bill of Lading ;

(*c*) " receiver " includes the consignee and the owner of the goods, also the endorsee and the holder of the Bill of Lading.

2. *Basis of Contract.*—This Bill of Lading is subject to :

(*a*) The Hague Rules of October, 1923, unless otherwise provided for in this Bill of Lading ;

(*b*) all compulsory provisions of law to which this carriage might be subject, it being understood that if the stipulations of this Bill of Lading are wholly or partly contrary hereto, this Bill of Lading shall be read as if such stipulations or part thereof, as the case may be, were deleted.

3. *Period of Responsibility.*—The responsibility of the carrier shall commence only when the tackle of the carrier's ship is hooked on to the cargo for loading and cease absolutely when such tackle is unhooked in the process of discharging.

Goods in the custody of the carrier or his servants before loading and after discharge whether being forwarded to or from the ship or whether awaiting shipment, landed or stored, or put into hulk or craft belonging to the carrier or not, pending transhipment at any stage of the whole transport, are in such custody at the sole risk of the shipper and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever.

4. *Immunities.*—Loss or damage arising or resulting *inter alia* from ullage, leakage, drainage, climate, heat heating, explosion, sweating, deterioration or change in quality, decay, rust, bending, chafing, breakage, the packing being stained, repaired or torn, the goods being unpacked or packed in unpressed and/or unhooped bales, trusses, skeleton cases, crates, single bags, paper bags, or cartons, from rats or other vermin, action or effect on any part of the cargo by other goods or materials which are or have been present on board ship, from fumigation or such like measures, acts, neglect, or default of persons not in the service of the carrier, even if they do work on board ship on behalf of the ship or the cargo, from any accident to loading or discharging tackle, hull, boilers, engines, machinery, refrigerating and/or oiling plant, or other appurtenances, shall be deemed to be due to causes mentioned in Article IV, sub. 2*a* up to and including *p* of the Hague Rules.

5. *Delay in Delivery.*—The carrier is not liable for any loss or damage caused to the shipper in consequence of any delay in the delivery of the cargo arising from any cause whatsoever. Delivery of originally missing cargo can take place at all times.

6. *Marks.*—Goods are not to be deemed sufficiently marked unless the port of destination is distinctly marked upon such by the shipper before shipment in letters of at least 5 cm. high in such a manner as will remain legible until delivery.

In no case does the carrier accept responsibility for delivery to other than leading marks.

7. *Incorrect Statements.*—Incorrect statements from the shipper shall in all cases be considered as wilfully mis-stated unless the contrary is proved.

Exhibits

P 19.
Bill of Lading.
29-1-48.
—*continued.*

8. *Bulk Cargo.*—As the carrier has no reasonable means of checking the weight of bulk cargo any reference to such weight in this Bill of landing shall be deemed to be for the convenience of the shipper only but shall consititute in no way evidence against the carrier.

9. *Carriage and Stowage.*—The carrier has the right to accept cargo of all kinds dangerous or otherwise for carriage on or under deck, including contraband, explosives, munitions, or warlike materials.

If in connection with any port-regulation dangerous or objectionable cargo is submitted to any extra handling *en route* or at final destination, all expenses thereof to be for account of the goods.

The carrier is at liberty to stow the goods in poop, forecastle, deckhouses, shelterdeck, sparebunkers, tonnage opening, or any other covered-in space and goods so stowed shall be deemed for all purposes to be stowed under deck ; also to carry the goods below deck and/or on deck in connecting ships and/or lighters and/or any craft whatsoever.

10. *Deck Cargo and Live Stock.*—Deck cargo and live stock to be handled and carried at the sole risk of the shipper.

11. *Freight.*—Freight to be paid in advance is due on shipment together with primage and charges and shall in no case be refunded, neither totally nor partly, whatever may befall ship and/or cargo. If not prepaid though stipulated, the freight, primage, and charges increased by the cost of advice of non-payment must be paid by the receiver.

Freight payable at destination is due on arrival together with primage, and charges and shall be paid before the delivery of the cargo, irrespective of the condition of same.

In all circumstances the shipper remains responsible for the freight, primage, and charges, until same have been paid.

The freight shall be computed upon the basis of the particulars in this Bill of Lading or upon the gross weight, measurement, value or number, ascertained at the port of discharge, at the option of the carrier unless otherwise agreed.

12. *Penalty Freight.*—The carrier has the right to have the value estimated or to have the contents, measurements, or weight verified by experts and if the particulars furnished by the shipper turn out to be incorrect the carrier is entitled to charge double the freight which should have been charged had the cargo been correctly described, together with the cost of checking.

13. *Security.*—The carrier is not bound to discharge and/or deliver and/or complete delivery of the cargo unless security has been given for freight, primage and charges, and/or for all expenses incurred on behalf of the shipper and/or the cargo and/or for any amount due to the carrier in connection with the transport under this Bill of Lading and/or general average. If no such security is given all rights conferred on the carrier in Clause 14 will be equally applicable.

14. *Discharge and Delivery.*—Discharge may commence without previous notice.

The carrier shall be at liberty at any time to send the goods to shore by ships, lighters, or any other craft at his option, and/or to store the goods on wharf or quay or other spaces open or covered, or in lighters, or other craft, all at the risk and expenses of the receiver.

The goods may be discharged and must be taken receipt of either ashore or overside, at the carrier's option, as soon as the ship is ready to unload and as fast as she is able to discharge, in any state of weather, continuously day and night, Sundays and holidays included, any custom of the port notwithstanding.

If the receiver fails to take receipt of the cargo as stipulated above the contract of carriage shall be considered as having been fulfilled and the carrier shall have the right to claim demurrage and/or to discharge and store the cargo as set out above and/or to carry on the cargo to the first convenient port, at his discretion for discharge at that port, all at the risk and expense of the receiver.

Whenever it is compulsory or customary at any port to deliver the cargo to the customs or port authorities or to any person, corporation, or body of administration, the carrier shall have the right to appoint this person, corporation, or body of administration and delivery so made shall be considered as final delivery, the receiver to pay all expenses connected therewith, including quay-dues.

Any masterporterage to be performed by the party appointed by the carrier at the risk and expense of the receiver.

All expenses connected with discharge and delivery to be paid by the receiver as per tariff rate at port of discharge.

If the cargo is not taken receipt of the carrier is at liberty to sell same with or without legal authority ; if the proceeds should not cover the total amount due, the shipper shall be liable for the difference.

15. *Expenses, Duties, etc.*—The expenses connected with discharge and delivery to be paid by the receiver as per Clause 14 are held to include all expenses for measuring, weighing, sorting, stacking, taking samples, statistical dues, stamps, and all other similar charges. Furthermore the receiver to pay any duty,

Exhibits.

P. 19
Bill of Lading.
29-1-48.
—*continued.*

tax, surtax, or impost levied, under any name and of whatever nature, on the goods or on the ship by reason of having these goods on board also if levied by reason of the goods having been transhipped during the voyage or carried or discharged under quarantine.

16. *Forwarding and Transhipment.*—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 on carriage in the same or other ship or by any other means of conveyance.

The responsibility of the carrier shall be limited to the part of the transport performed by him on the ship under his management and no claim will be acknowledged by the carrier for damage and/or loss arisen during any other part of the transport, even though the freight for the whole transport has been collected by him.

The shipper authorizes the carrier to enter into contracts on his behalf for the precarriage and/or oncarriage of the goods and/or storing, lightering, transshipping, or otherwise dealing with such, prior to, or in the course of, or subsequent to the carriage in his ship without responsibility for any act, neglect, or default on the part of the carrier even though the terms of such contracts be less favourable in any respect whatsoever to the shipper than the terms of this Bill of Lading.

The cargo to be carried on as soon as possible but the carrier not to be liable for delay. In case of delay or of any increase in the cost of transhipment due to any cause beyond the control of the carrier the additional charges must be paid by the receiver before delivery of the cargo.

If the goods are forwarded by more than one conveyance the receiver must take delivery of each portion immediately after arrival.

17. *Pilots, Towage, Drydocking, Armament, Convoy.*—The ship shall have liberty to sail with or without pilots, to tow and assist vessels under all circumstances and in all situations or to attempt to do so, to be towed, to drydock at any time for any purpose whatsoever with or without cargo on board, also to sail armed or unarmed, under convoy or not.

18. *Special Circumstances.*—If according to the opinion of the carrier the loading, carriage, discharge, or delivery, is or threatens to be impeded or delayed at the port of loading, destination, or elsewhere, by the imminence or existence of war or warlike operations, civil war, riots or civil commotions, or by blockade or seizure of or embargo on ship and/or cargo, or prohibition of import or export or transmit, or other measures taken by any government or other authority or body or organisation purporting or claiming to exercise the power of a government or authority, or by quarantine, sanitary, customs or labour regulations lock-outs. strike or other disturbances, or by ice or bad weather, or by average

to ship and/or cargo, or by congestion or absence, from any cause, of facilities for loading, discharge, or delivery, or by the imminence of danger to ship and/or crew and/or cargo and/or passengers and in all circumstances which in the opinion of the master are similar to any of the abovesaid, the carrier is at liberty to discharge into hulk or craft and/or to land and/or store the cargo either at or off the port where the ship is or at any other port at his option and/or re-ship and/or forward the goods to their destination—which forwarding shall be done subject to the conditions of transport in force for the means of conveyance completing the transport - or to return the goods to the port of loading or to dispose of the goods or any part thereof in any other way, all at the risk and expense of the shipper. The contract of carriage shall thereupon be considered completed and the carrier to have complied with all his obligations, full freight being earned, and payable.

19. *Notice of Claims.*—Notice of claims arising under this Bill of Lading of legal claims must be lodged not later than defined in the Hague Rules.

The carrier shall not be liable to pay any compensation if the nature or the value of the goods has been wilfully misstated.

20. *Evidence.*—The ship's protest and/or a true copy of the ship's log shall be deemed conclusive evidence of the facts and circumstances stated therein.

In case of a total loss of the ship and/or the cargo and also in case of absence of tidings it is assumed unless the contrary is proved, that the loss of the ship and/or the cargo has not been caused by unsea-worthiness or by the actual fault or privity of the carrier or by the fault or neglect of the agents or servants of the carrier.

21. *Indemnity.*—If the carrier is responsible for damage or loss the indemnity payable shall be calculated on the basis of the invoice value or at his option on the market value of the goods at the port of destination on the day of arrival or in case of non-arrival on the day of expected arrival after deducting freight, duties and expenses saved, on the understanding, however, that such indemnity shall in no case exceed £100 per package of unit unless the value has been declared by the shipper and freight is paid or payable on *ad valorem* basis. No allowance shall be made for loss of profit.

22. *Reconditioning of Cargo.*– All cost of mending repairing, baling, cooperage, repacking, etc., to be for account of the goods.

23. *Custom Regulations, etc.*– The shipper and receiver are obliged to comply with all regulations and requirements of port, customs, or any other authorities and to pay and/or indemnify the carrier and/or the owners of other cargo on board for all costs, losses, damages, duties, or fines, of whatever nature, incurred or suffered in consequence of the non-observance or incorrect fulfilment thereof. If the goods are not permitted to be delivered or imported the carrier shall be at liberty to dispose thereof, even by destroying, or to bring back or to

Exhibits.

P 19.
Bill of Lading.
29-1-48.
—*continued.*

re-ship such goods to the port of loading or any other port, all at the risk and expense of the goods.

24. *General Average.*—General Average shall be adjusted at Amsterdam or Rotterdam or at any other place in the option of the carrier, by average adjusters to be appointed by him. The adjustment to be drawn up according to the York-Antwerp Rules, 1924 (with the addition that in all cases where the ship be ashore all expenditure made and damage sustained by the ship in endeavouring to refloat her will be allowed in general average) and according to local practice of the place of adjustment.

The shipper by accepting this Bill of Lading expressly waives and renounces Art. 700 of the Code of Commerce of the Netherlands.

The receiver is bound to sign before delivery of the cargo the General Average Bond in use with the carrier and to pay a deposit to the amount fixed by the carrier as a security for the contribution ultimately due. The deposits to be dealt with according to the practice of the place of adjustment and/or to any agreement which the carrier might have made with underwriters in respect thereto, the carrier being always entitled to have the deposits converted without notice into the currency in which the Statement shall be drawn up.

If the receiver fails to furnish the carrier with the required particulars, the value of the goods shall be fixed by a surveyor or surveyors appointed by the carrier or the average adjusters.

25. *Salvage, etc., and Collision.*—In case of salvage accident, or other special circumstances the measures and arrangements of the carrier in regard to ship and/or cargo shall be equally binding upon the shipper.

If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect, or default of the master, mariner, pilot, or the servant of the carrier in the navigation or in the management of the ship the shipper of the goods carried under this Bill of Lading will indemnify the carrier against all loss or liability to the other or non-carrying ship or her owners, in so far as such loss or liability represents loss of or damages to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of the said goods and set off, recouped, or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or the carrier.

26. *Law of Application.*—In so far as anything has not been dealt with by the provisions of this Bill of Lading the Law of the Netherlands shall apply.

27. *Jurisdiction.*—All actions under this contract of carriage shall be brought before the Court at Amsterdam or Rotterdam and no other Court shall have jurisdiction with regard to any such action unless the carrier appeals to another jurisdiction or voluntarily submits himself thereto.

Exhibits.

P 19.
Bill of Lading.
29-1-48.
—*continued.*

WAR RISK CLAUSE

The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppage destination, delivery or otherwise howsoever given by the Government of the Nation under whose flag the vessel sails or any department thereof, or any person acting or purporting to act with the authority of such Government or of any department thereof, or by any committee or person having under the terms of the War Risks Insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a revision, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly.

HOLLAND-COLOMBO TRADING COMPANY, LTD.,

Signed : Illegible,
Director.

D 1.
Invoice.
6-2-48.

D 1.
Invoice.

"D 1"

HOLLAND-COLOMBO TRADING SOCIETY LTD.

Telephones : Royal 4471, 4472, 4473

Telegrams : KNILO ALD-LONDON.
Cablegrams : KNILO-LONDON.

London E.C. 3, 6th February, 1948.
90, Fenchurch Street.

Bankers :
CHARTERED BANK OF INDIA, AUSTRALIA & CHINA.
Bank of BRITISH WEST AFRICA LTD.
B. W. BLYDENSTEIN & Co.

Export Order No. 1225.
Indent Nos. 85.

Invoice No.

MESSRS. HOLLAND-COLOMBO TRADING SOCIETY LTD.,
P.O. Box 353, Colombo, Ceylon.

Dr. to HOLLAND-COLOMBO TRADING SOCIETY LTD.,

Exhibits.
D 1.
Invoice.
6-2-48
—*continued.*

for the following goods sold to you and forwarded for your account and risk per ss. " Laurenskerk " from Rotterdam to Colombo :—

H.C.T.S. —6 bales White Shirtings, Cotton Manufacture
SSKHA & SONS —5 bales each containing 50 pieces 42 in./ 40 yds. Lucinde
COLOMBO — Quality White Shirtings—
7/12 in all 10,000 yds.
1 bl. contg. 41½ pcs. in all 1,544 ,,

Total 291½ pieces — 11,544 yds. at 40*d.* per yard
£1,924.0.0 c.i.f. Colombo

Freight paid.
Made in Holland.
Import Licence No. EC/Holland/47/183.
Export Licence No. 18/0002/21/7/53.
C.i.f., Colombo.
Insured for £2,117.
Gross Weight : 1,295 kos.
Nett Weight : 1,253 ,,
Nett Nett : 1,241 ,,

Measurements :

Bale 7 = 109 x 37 x 81 cm. — 0,327 M 3
,, 8 = 109 x 37 x 81 ,, — 0,327 ,,
,, 9 = 109 x 37 x 81 ,, — 0,327 ,,
,, 10 = 109 x 37 x 81 ,, — 0,327 ,,
,, 11 = 109 x 37 x 81 ,, — 0,327 ,,
,, 12 = 109 x 37 x 60 ,, — 0,242 ,,

In all 1,877 M 3

Sgd. (Illegibly)
Director.
Holland-Colombo Trading Society, Ltd.

P 15
Letter from Plaintiff to Defendants.
13-2-48

P 15.

Letter from Plaintiff to Defendants.

" P 15 "

13th February, 1948.

Imports.

MESSRS. S. S. K. HAJA ALAWDEEN,
Second Cross Street, Colombo.

Exhibits.

P 15.
Letter from Plaintiff to Defendants-
13-2-48.
—*continued.*

Dear Sirs,

Indent No. HCTS/ 5
300 Pieces Dutch White Shirtings (Lucinde).

Further to our letter of the 21st ultimo, we are advised by our London office that your above indent has been executed by ss. " Laurenskerk " which loaded on the 28th January.

The relative documents will be presented to you for payment in due course Assuring you of our best services.

Yours faithfully,

Sgd. (Illegibly)

P 20.

P 20.
Invoice.
19-2-48.

Invoice.

HOLLAND-COLOMBO LTD.
(Liability of Shareholders Limited).

Invoice No. 13,096.
Indent No. H.C.T.S./85.

Copy

Invoice.

MESSRS. S. S. K. HAJA ALAWDEEN & SONS,
99, Second Cross Street, Colombo.

Dr. to HOLLAND-COLOMBO TRADING SOCIETY, LTD.,

for the following goods sold to you and forwarded for your account and risk per ss." Laurenskerk " from Rotterdam arrived ex ss. " Triport "

H.C.T.S.		
S.S.K.H.A. & SONS, COLOMBO	6 bales White Shirtings, cotton manufacture	Rs. cts.
7/12	" Lucinde " quality 42 in. 40 yds./ as per London office invoice attached.	
	291½ pieces—11,544 yards at 40*d.* per yard : £1,924.0.0	
	c.i.f. Colombo at Exchange rate 1/5 15/16 Rs. 25,742.72	
Made in Holland		

HOLLAND-COLOMBO TRADING SOCIETY LTD.

Colombo, 19th February, 1948.

Sgd. (Illegibly)

E. & O. E.

Exhibits.

P 16.
Letter from Plaintiff to Defendants.
26-2-48.

P 16.
Letter from Plaintiff to Defendants.

"P 16"

26th February, 1948.

MESSRS. S. S. K. HAJA ALAWDEEN,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85—300 Pieces White Shirtings (Dutch)

Referring to our letter of the 13th instant, we have received the document 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. 13,096 for Rs. 25,742.72 covering the 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.

Yours faithfully,
Sgd. (Illegibly)

P 17.
Letter from Defendants to Plaintiff.
28-2-48

P 17.
Letter from Defendants to Plaintiff.

"P 17"

Licence No. 914/C-914

S. S. K. HAJA ALAWDEEN & SONS,
Piece Goods Merchants and Importers,
99, Second Cross Street.

Colombo, 28th February, 1948.

To MESSRS. HOLLAND-COLOMBO TRADING SOCIETY LTD.,
P.O. Box 353, Colombo.

Dear Sir,

Indent No. HCTS/85.

We return herewith the two invoices attached to your letter of 26th instant and would refer you to our letter 17th ultimo in this connection.

Thanking you,

Yours faithfully,
Sgd. S. S. K. HAJA ALAWDEEN & SONS,
Partner.

Exhibits.

P 18.
Letter from Plaintiff to Defendants.

P 18.
Letter from Plaintiff to Defendants.
2-3-48.

" P 18 "

2nd March, 1948.

MESSRS. S. S. K. HAJA ALAWDEEN,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85—*ex* ss. " Laurenskerk."

We refer to your letter of 28th ultimo and our subsequent interview with you in this connection yesterday, and wish to point out once again that the above shipment is entirely in conformity with the terms and stipulations of the indent. We have shown to you personally that the bill of lading proves shipment in January and as such your letter under reference returning our bill and refusing payment is a breach of contract.

We are re-presenting our bill herewith and shall be thankful to have your cheque in payment of same, so that we might remit proceeds to London without further delay.

Yours faithfully,

Sgd.....

P 21.
Letter from Plaintiff to Defendants.

P 21.
Letter from Plaintiff to Defendants.
9-3-48.

" P 21 "

9th March, 1948.

MESSRS. S. S. K. HAJA ALAWDEEN & SONS,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85—*ex* ss. " Laurenskerk."

We regret that our letter of the 2nd March, requesting payment of our bill in respect of the above indent has met with no response. Please send us your remittance and take up documents, as we cannot delay our remittance to London any longer.

Awaiting to hear,

Yours faithfully,

Sgd. (Illegibly)

P 22.
Letter from Plaintiff to Defendants. 3-4-48.

P 22.
Letter from Plaintiff to Defendants.

"P 22"

3rd April, 1948.

MESSRS. S. S. K. HAJA ALAWDEEN & SONS,
99, Second Cross Street, Colombo.

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.

Yours faithfully,

Sgd. (Illegibly)

P 23.
Letter from Plaintiff to Defendants. 12-4-48.

P 23.
Letter from Plaintiff to Defendants.

"P 23"

12th April, 1948.

MESSRS. S. S. K. HAJA ALAWDEEN & SONS,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85—Six Bales White Shirtings *ex* ss. "Triport".

We refer to our interview in connection with the above and note that you are expecting you 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.

Yours faithfully,

Sgd. (Illegibly)
For HOLLAND-COLOMBO TRADING SOCIETY LTD,

Exhibits.

P 24.
Letter from Julius & Creasy to Defendants.
17-4-48.

P 24.
Letter from Julius & Creasy to Defendants.

"P 24"

Our Ref: HP/BE,

17th April, 1948.

MESSRS. S. S. K. HAJA ALAWDEEN & SONS,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85—Holland-Colombo Trading Society Ltd.

We are instructed by our clients Messrs. Holland-Colombo Trading Society Ltd., in regard to the above indent for 300 pieces white shirting which goods have, as already intimated, arrived in Ceylon but have not been taken delivery of.

We enclose our client's bill for Rs. 25,742.72 being the amount due thereon. Should you fail to make payment of the amount due herein by the 20th instant, our clients will have no option but to sell the goods in terms of the indent against you at your risk and on your account and claim any damages they may sustain.

Yours faithfully,

P 1.
Letter from Plaintiff to J. G. Vandersmagt.
4-5-48.

P 1.
Letter from Plaintiff to J. G. Vandersmagt.

"P 1"

HOLLAND-COLOMBO LTD.
Liability of Shareholders
Limited.

Head Office :
London,
90, Fenchurch St., E.C. 3

Telegrams :
"Knilo", Colombo
All Codes Used

Telephones : 4287–8–9

Colombo, 4th May, 1948.
P.O. Box 353

COL. J. G. VANDERSMAGT,
20, Baillie Street,
Fort, Colombo

Exhibits.

P 1.
Letter from Plaintiff to J. G. Vandersmagt.
4-5-48.
—*continued.*

Dear Sir,

Confirming our interview with you this morning, we authorise you to sell by public auction the lot of 6 bales Dutch White Shirtings shipped by the ss. " Laurenskerk " and arrived *ex* ss. " Triport " early in April, 1948. This shipment was made for and on behalf and against the order of S. S. K. Haja Alawdeen & Sons at whose risk the goods are being auctioned.

As the matter may have to go to Court, please contact our solicitors, Messrs. Julius & Creasy, should there be any occasion pertaining to this auction.

The relative shipping documents and Import Licence are enclosed which please acknowledge.

Yours faithfully,

HOLLAND-COLOMBO LTD.

Sgd. (Illegible),
Secretary.

Encl : Documents
Import Licence

P 2.
Letter from J. G. Vandersmagt to Julius & Creasy-
6-5-48.

P 2.

Letter from J. G. Vandersmagt to Julius & Creasy.

" P 2 "

Telegraphic Address :
" Lions ", Colombo
J. G. VANDERSMAGT,
Successor to
A. Y. DANIEL & SON,
Auctioneers,
Brokers and Appraisers.

Established : 1880

Telephone No. 4985

20, Baillie Street,
Colombo 1.

6th May, 1948.

Messrs. JULIUS & CREASY,
Proctors & Notaries,
Fort, Colombo.

Auction Sale on 11th May, 1948

Exhibits.
P 2.
Letter from J. G. Vandersmagt to Julius & Creasy. 6-5-48. —*continued.*

Dear Sirs,

On instructions received from Messrs. Holland-Colombo Ltd., we are selling by public auction at No. 16. Warehouse, H.M. Customs, Colombo, six bales White Shirtings shipped by the ss. " Laurenskerk " and arrived by ss. " Triport " the shipment made for and on behalf of S. S. K. Haja Alawdeen & Sons.

The auction will take place on Tuesday the 11th May, 1948, at 11 a.m.

A copy of our advertisement is enclosed.

Yours faithfully,

Sgd. J. G. VANDERSMAGT,

of A. Y. DANIEL & SON,
Auctioneer & Broker.

P 25.
Letter from Julius & Creasy to Defendants.

P 25.
Letter from Julius & Creasy to Defendants. 6-5-48.

" P 25 "

Our Ref : HP/BE

6th May, 1948.

Messrs. S. S. K. HAJA ALAWDEEN & SONS,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85—Holland-Colombo Trading Society Ltd.

Since we have received no reply to our letter of the 17th ultimo we have now advised our clients to put up the goods for sale by public auction and to claim from you all damages that they may sustain by reason of your default in taking up the documents.

Yours faithfully,

Exhibits.

P 3.
Copy of Advertisement.
7-5-48.

P 3.

Copy of Advertisement.

"P 3"

AUCTION SALE

OF

WHITE COTTON SHIRTING

On instructions received, I shall sell by Public Auction on Tuesday

the 11th May, 1948, at 11 a.m.

At No. 16, Warehouse, H.M. Customs,

Colombo

11,544 Yards "Lucinde" White Cotton Shirting 42 in. wide.

ON ACCOUNT OF THE CONCERNED

Inspection of Sample at my office No. 20, Baillie Street,

Fort, Colombo.

Full Payment and Removal Immediately after the Sale.

J. G. VANDERSMAGT,

Auctioneer & Broker.

20, Baillie Street, Fort, Colombo.

Phone : 4385.

Mr. Billimoria,

Copy of advertisement herewith which was left out in error.

Sgd. (Illegible).

Exhibits

P 27.
Customs Entry.
2-6-48.

P 27.
Customs Entry.

HOLLAND-COLOMBO TRADING SOCIETY, LTD., COLOMBO — No. 102C.

In the Vessel "TRIPORT" from ROTTERDAM

Marks & Nos.	Classification		Description of Goods	Quantity	Country of Production	invoice Value	Rate of Exchange
	Class	Group					
SSKHA & SONS COLOMBO.	III	I	Six bales contg. Cotton piece goods (White Shirtings)	Pcs. 291½ Yds. 11544 Sq. Yds. 13468	HOLLAND	£ 1924-0-0	1/5 15/16 8·87

Value : Rupees Twenty-eight thousand and Twenty-six and Cents Ten only.

Duty : Rupees Two thousand eight hundred and two and Cents sixty-one only.

Rent and Dues : Rupees One and Cents Fifty only.

I, E. W. Olink, Director of Holland-Colombo Ltd., do hereby declare that I am the (Importer or authorised by the Importer) of the goods contained in this entry and that I enter the same (stating which if parts only) at the respective sum or value mentioned opposite to the said articles and amounting together to the sum of Rupees Twenty-eight thousand and twenty-six and Cents Ten only.

Witness our hand this 31st day of May, 1948.

Sgd. (Illegibly),
Director,
Holland-Colombo Ltd.

Exhibits.

P 27.
Customs
Entry.
2-6-48

Value for Duty Rs.	Value for Duty cts.	Rate of Duty Pre-ferential	Rate of Duty General	Duty Rs.	Duty cts.	First Rent & Harbour Dues: Dimensions or other Details	Whether Details appear on B/L Invoice or L. W.'s Record, No. and Rate.	Amount Rs.	Amount cts.
25742	72		10%	2802	61	$3\frac{1}{2}' \times 2\frac{1}{2}' \times 1'$	6 @ -/10		60
2283	38								60
28026	10							1	20
							Plus 25%		30
							Rent & Dues	1	50
							Duty	2802	61
								2804	11
							Rent	—	(Torn)
							Dues	—	
								1	

Received—
By Cheque Rs. 2,804.11
Cash Rs. — — —
2/6 Indt.

Exhibits.

P 28.
Warehouse Rent Receipt.
3-6-48.

P 28.
Warehouse Rent Receipt.

" P 28 "

HOLLAND-COLOMBO LTD.

Import Warehouse Rent.

Due to H.M. Customs the under-mentioned sum for Import Warehouse Rent on goods landed in the warehouse, viz. :—

Ship		ss. " Triport " of 2-4-48 Rotterdam
Marks .		HCTS/SSKHA & Sons
Number of Packages		Six
Description of Goods		Bales C. P. Goods
From .		9th April, 1948
To ..		3rd June
No. of Days ..		56
		Rs. cts.
Rate per Day ..		0 20
	Add.	25%
		Rs. cts.
Amount		67 20
		16 80 under each
		84 00
Rupees Eighty-four only		84 00

3/6

Sgd. (Illegibly)
Asst. Shroff, H.M. Customs.

Checked by :
Sgd. (Illegibly),
Dues Clerk.

3rd June, 1948.

P 29.
Harbour Dues Receipt.
3-6-48.

P 29.
Harbour Dues Receipt.

" P 29 "

HOLLAND-COLOMBO LTD.

Exhibits.

P 29.
Harbour Dues Receipt.
3-6-48.
—*continued.*

Import Harbour Dues.

Due to H.M. Customs the under-mentioned sum for Import Harbour Dues on goods landed in the Warehouse, viz. :—

Ship	..	ss. "Triport" of 2-4-48 Rotterdam
Marks	.	HCTS/SSKHA & Sons
Number of Packages		Six
Description of Goods		Bales C. P. Goods
From		9th April, 1948
To	..	3rd June
No. of Days		56
		Rs. cts.
Rate per Day		0 10
		Rs. cts.
Amount	.	33 60
Add 25 %	..	8 40
		42 00
Rupees Forty-two only		Rs. 42

3/6

Sgd. (Illegibly),
Asst. Shroff, H.M. Customs.

Checked by :
Sgd. (Illegibly),
Dues Clerk.

23rd June, 1948.

P 30.
Bill.

P 30.
Bill.
6-6-48.

"P 30"

Telegraphic Address : Newland.
Phone : Nos. 2882 & 8509.

Office - Export :
Baghdad Area, H.M. Customs.
Colombo, 6th June, 1948.

MESSRS. HOLLAND-COLOMBO LTD. *Dr.*

To THE NEW LANDING & SHIPPING CO., LTD.

Ship-chandlers, Landing, Shipping, Clearing and Forwarding and Schooner Agents.

No. 36.

To Landing Cargo *ex* ss. "Triport" of 3-4-48- 6 Bales c.p. goods
Value Rs. 30,828.71 at $\frac{1}{4}$% of value Rs. 77.07

PAID :
9th June, 1948—(Debit Suspense A/c.)

E. & O. E.

Exhibits.

P 4.
Letter from A. M. Marzuk to Plaintiff. 29-6-48.

P 4.
Letter from A. M. Marzuk to Plaintiff.

"P 4"

J. G. VANDERSMAGT,
Auctioneer & Broker.

20, Baillie Street, Fort,
Telephone No. 4985

Colombo, 29th June, 1948.

MESSRS. HOLLAND-COLOMBO TRADING SOCIETY LTD.,
Colombo.

Dear Sirs,

Sale of White Cotton Shirting

I enclose herein cheque for Rs. 14,052.84 being nett proceeds of the sale of the above, at No. 20, Baillie Street, Fort, Colombo, and also a cheque for Rs. 1,000 being deposit received from Mr. K. M. Buhari, the purchaser of the 1st sale, the receipt of which please acknowledge.

Yours faithfully,

Sgd. A. M. MARZUK,

of A. Y. DANIEL & SON,
Auctioneer & Broker.

P 5.
Account Sales. 29-6-48.

P 5.
Account Sales.

"P 5"

Telegraphic Address :
"Lion", Colombo.
J. G. VANDERSMAGT,
Successor to
A. Y. DANIEL & SON,
Auctioneers,
Brokers & Appraisers.

Telephone No. 4985.

20, Baillie Street, Colombo.

2nd Sale

Account sales of White Cotton Shirting sold by the undersigned by public auction at No. 20, Baillie Street, Fort, Colombo, on Friday 11th June, 1948, on instructions received from—

Exhibits.

P 5.
Account Sales.
29-6 48,
—*continued.*

MESSRS. HOLLAND-COLOMBO TRADING SOCIETY LTD.,

11,544 yards White Cotton Shirting, 42 in. wide at Rs. 1.30 per yard 15,007.20.

Charges :

	Rs.	cts.	
To Advertisements	194	00	
,, Reprints	7	50	
,, Gongbeater and circular	2	50	
,, Commission .	750	36	954.36

Rs. 14,052.84

10 Sgd. A. M. MARSUK,

of A. Y. DANIEL & SON,
Auctioneer & Broker.

Colombo. 29th June, 1948.

P 26.
Letter from Julius & Creasy to Defendants.

P 26.
Letter from Julius & Creasy to Defendants.
28-8-48.

"P 26"

28th August, 1948.

Our Ref : "G"

MESSRS. S. S. K. HAJA ALAWDEEN & SONS.
99, Second Cross Street, Colombo.

20 Dear Sirs,

Re Indent No. HCTS/85— Holland-Colombo Trading Society Ltd.

Further to the letter which we wrote to you on the 17th April last our above named clients inform us that you failed to honour the contract in terms of the above numbered Indent and that they therefore took up the goods and sold them at your risk and on your account.

We now write to demand from you the sum of Rs. 13,697.06 being damages sustained by our clients calculated as under, and shall be grateful to receive this sum from you within seven days from today's date failing which we have instructions to file action against you without further notice.

Exhibits.

P 26.
Letter from Julius & Creasy to Defendants. 28-8-48. —*continued.*

Statement

	Rs.	cts.
Invoice value	25,742	72
Duty and Dues	2,804	11
Customs Extra Rent and Dues	126	00
Landing Charges	77	07
	28,749	90
Amount realised per Sale by Public Auction	15,052	84
Balance due	13,697	06

Yours faithfully,

P 31.
Letter from S. Kanagarajah to Julius & Creasy. 10-9-48.

P 31.

Letter from S. Kanagarajah to Julius & Creasy.

"P 31"

S. KANAGARAJAH,
Proctor & Notary.

Office : 282/24, Dam Street,
Phone : 3530.
Hultsdorp, 10–9–1948.

Private Address :
Ganesha Villa,
109, Kotahena Street,
Colombo.
Phone : 3521.

MESSRS. JULIUS & CREASY,
Proctors & Notaries, Colombo.

Re Indent No. HCTS/85 Holland-Colombo Trading Society Ltd.

Dear Sirs,

Your letter marked "G" of the 28th ultimo addressed to Messrs. S. S. K. Haja Alawdeen & Sons, of 99, Second Cross Street, Colombo, has been referred to me for reply. I am instructed to state that my clients are not liable to pay your clients the sum of Rs. 13,697.06 or any sum whatsoever. My clients have already indicated to your clients that under misrepresentation your client's representative obtained the initials of my client to certain documents. Furthermore, the contract had been broken by reason of the fact that the goods did not reach Ceylon on the appointed date. Your clients in order to adhere to the spirit of the contract purported to convey the goods by ss. "Laurenskerk" which was only bound to Genoa and to no other place. Thereafter they were transhipped from Genoa to Colombo on the 5th March, 1948. My clients in no way consented to this devious arrangement or to the transhipment of the said articles.

Yours, faithfully,
Sgd. S. KANAGARAJAH.

Supreme Court of Ceylon
No. 311 (Final) of 1950.

District Court, Colombo
No. 20182

In Her Majesty's Privy Council on an Appeal from The Supreme Court of Ceylon.

BETWEEN

HOLLAND COLOMBO TRADING SOCIETY LIMITED, Colombo.....*Plaintiff—Appellant.*

VERSUS

1. SEGU MOHAMED KHAJA ALAWDEEN
2. MOHAMED OWDHU son of HAJA ALAWDEEN
3. MOHAMED LEBBE MARIKAR son of HAJA ALAWDEEN and
4. SEGU MOHAMED BUHARI son of HAJA ALAWDEEN all carrying on business in partnership under the name style and firm of "S. S. K. HAJA ALAWDEEN AND SONS" at No. 99 Second Cross Street, Pettah,

Colombo.....*Defendants—Respondents.*

RECORD OF PROCEEDINGS.

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