
(1923) 07 BOM CK 0001
In the Bombay High Court

Chotalal Lallubhai and Others

APPELLANT

Vs

Champsey Umersa and Sons

RESPONDENT

Date of Decision : 03-07-1923

Acts Referred:

Citation : 75 Ind. Cas. 233

Hon'ble Judges : Mulla, J

Bench : Single Bench

Judgement

Mulla, J.—This is a suit for the price, of twenty five bales of Japanese yarn agreed to be sold by the plaintiffs to the defendants, and, in the alternative, for damages for failure on the part of the defendants to pay for and take delivery thereof.

2. By a contract dated 2nd February 1918 (Exhibit A) the plaintiffs agreed to buy from Messrs. Gosho Kabooshiki Kaisha twenty-five bales of Japanese yarn of February-March 1918 shipment, but the shipment was not guaranteed.

3. By a contract in the Gujrati language, dated 21st August 1918, the plaintiffs agreed to sell the said twenty-five bales to the defendants. The following is an official translation of the material portions of the said contract:

This day we have purchased from you the goods of the below-written details in accordance with the Bazaar rules of which you please take note. To cancel or not to cancel the sold goods for any of the reasons solely depends upon you. Cotton yarn No. 60-2 of Japan shipment for February-March 1918 bought of Messrs. Gosho Kaisha; (the delivery of the same) is to be given whenever the same may arrive earlier or later, (and) on the safe arrival (of the same) by steamer.

4. It may be observed that there is no word in the vernacular corresponding to "solely" in the above translation.

5. On 25th September 1918, the defendants addressed a letter to the plaintiffs stating that unless the goods were delivered within eight days from the receipt

thereof the contract should be treated as cancelled. To the said letter the plaintiffs replied on 26th September 1918 stating that, having regard to the terms of the contract, the defendants were bound to accept the goods even if the goods arrived late. The eight days period expired on 3rd October 1918. The goods arrived in Bombay on 12th October 1918, and on the same day the plaintiffs wrote to the defendants informing them of the arrival of the goods and enquiring whether the plaintiffs should take delivery of the goods on behalf of the defendants or whether they should send the goods direct to the defendants. The defendants, by their letter of 15th October 1918, stated that the eight days" period having already expired the contract stood cancelled, and they refused to pay for and take delivery of the goods. The plaintiffs thereupon got the goods sold by public auction and thereafter they instituted the present suit.

6. The bales offered to the defendants were shipped from Japan in September 1918. On arrival of the said goods the plaintiffs took delivery thereof and they were taken to their godown. There is no doubt that the plaintiffs were ready and willing to deliver the goods to the defendants.

7. The principal defences to the suit are

(a) that there was no valid contract between the plaintiffs and the defendants; and

(b) that the goods offered being of September shipment the shipment could not be said to be a shipment within a reasonable time.

8. As regards the first defence, the argument of Counsel for the defendants was that, inasmuch as the writing (Exhibit B) gave an option to the plaintiffs to rescind the contract for any reasons whatsoever, the writing did not amount to an agreement in law. On the other hand, Counsel for the plaintiffs relied on the judgment of the Court of Appeal in *Chunilal Dayabhai & Co. v. Ahmedabad Fine Spinning & Weaving Company* 67 Ind. Cas. 223 : 24 Bom. L.R. 295 : A.I.R. (1922) (B.) 44 : 46 B. 806 as affording a complete answer to the defendants" contention.

. 9. As regards the first defence it is well-established that parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency: *Fry on Specific Performance*, 6th Edition, page 486. Such a stipulation is to be construed according to its natural meaning subject to the principle of law that a party shall not take advantage of his own wrong: *New Zealand Shipping Company v. Societe Des Ateliers Et Chantiers De France* (1919) A.C. L : 87 L.J.K. B. 746 : 118 L.T. 731 : 14 AS P.M.C. 291 : 62 S.J. 519 : 34 T.L.R. 400. It has thus been held that, where there is a stipulation in a contract for the sale of land enabling the vendor, to rescind the contract if the purchaser makes a requisition on title with which the vendor is unable or unwilling to comply, the vendor cannot rescind capriciously and arbitrarily, that is to say, without any reasonable cause, such a stipulation does not entitle the vendor to neglect to remove the objections to title raise a by

the purchaser, and then on the strength of his own neglect to annul the contract, In re Starr-Bowkett Building Society and Sibun (1889) 42 Ch. d. 375 : 58 L.J. Ch. 651 : 61. L.T. 346 : 38 W.R. 1, In re Jackson and Haden" Contract (1905) 1 Ch. 603 : 74 L.J. Ch. 389 : 53 W.R. 428 : 92 L.T. 591. affirmed in appeal (1906) 1 Ch. 412 : 25 L.J. Ch. 226 : 54 W R 434 : 94 L.T. 418, Cuinion v. Horne (1905) 1 Ch. 596: 75 L.J Ch. 293 : 54 W.R. 344 and Greaves v. Wilson (1858) 25 Beav 290 : 27 L.J. Ch. 546 : 4 Jur. (N.S.) 271 : 5 W.R. 482 : 53 E.R. 647 : 119 R.R. 420.

10. But the point raised by Counsel for the defendants is that the contract in the present case differs from those in the cases referred to above in that the option to rescind the contract is not made dependent on the happening of any specified contingency, but that it is an option to terminate the contract for any reasons whatsoever, and that the contract is, therefore, void for want of mutuality. But this point also is covered by authority. In New Zealand Shipping Company v. Societe Des Ateliers EtChantiers De France (1919) A.C. 1 : 87 L.J.K. B. 746 : 118 l.t. 731 : 14 AS P.M.C. 291 : 62 S.J. 519 : 34 T.L.R. 400 in dealing with the question whether a stipulation in a ship-building contract which enabled the builders to rescind the contract in certain specified circumstances, Lord Atkinson said (at page 9):

Of course, the parties may expressly or impliedly stipulate that the contract shall be voidable at the option of either party to it.

11. In Chunilal Dayabhai & Co, v. Ahamedabad Fine Spinning & Weaving Company 67 Ind. Cas. 223 : 24 Bom. L.R. 295 : A.I.R (1922) (B.) 44 : 46 B. 806, which was a case of a contract for the sale of goods, the contract contained the following, stipulation: "If you are not in a position to deliver the goods or if there be any dispute in respect of the goods or if the Company do not give delivery for any reason, the utmost that will be the result, will be that the "Soda" will be cancelled but we shall not ask for damages arising from the same from you in any way."

12. Under the said contract the plaintiffs took delivery of ninety bales out of one hundred and fifty-one bales mentioned in the contract. The defendants declined to give further delivery without giving any reason for such refusal and the plaintiffs sued the defendants for damages. The defence was that the defendants were not obliged, having regard to the terms of the contract, to give any reasons for refusing to deliver the remaining bales. This contention prevailed in the Court of first instance and the suit was dismissed. The plaintiffs appealed from the decree and the decree of the lower Court was reversed by the High Court of Bombay, on appeal. In delivering the judgment of the Court, Macleod C.J. said (page 297 page of 24 Bom. L.R.--[Ed.]):

It seems to me that the clause evidently means that some reason must be given by the defendants which would justify their refusing to give delivery, and that they were not entitled merely to say that the contract was off because they did

not wish to deliver any more goods under it.

13. Similarly, in the present case, if the plaintiffs refused to deliver the goods without assigning any reasons, they would, I think be liable to the defendants for breach of the contract unless they assigned some reason which would justify their refusal to give delivery. I do not think that the stipulation in the contract in the present case, namely, "to cancel or not to cancel the sold goods for any reasons depends upon you"" destroys the mutuality necessary for the formation of a contract. I think that the writing, Exhibit B, contains all the elements of a contract, and that the stipulation referred to above confers upon the plaintiffs the power to determine the contract if they could assign good reasons for so doing. I, therefore, hold that the contract, Exhibit B, is not void, but that it is a valid and binding contract.

14. The next point urged on behalf of the defendants is that the goods having been shipped in September 1918, the shipment could not be said to be one within a reasonable time and that it was not therefore, contract shipment. In considering the question whether the shipment was contract shipment it is important to note the date and the terms of the contract between the parties. The goods are described in the contract as being those agreed to have been purchased by the plaintiffs from Messrs. Goshu Kabooshiki kaisha. They are to be of February-March 1918 shipment, but the defendants are bound to take delivery thereof "whenever the same may arrive earlier or later, (and) on the safe arrival (of the same) by steamer." The contract was made on the 21st August 1918, that is, about five months after the last date for February-March 1918 shipment. It is significant to note that though the contract was made after that long interval, it was thought necessary to provide for late shipment in the contract. There is nothing in the evidence to suggest that either party had at the date of the contract any reason to believe that the goods had already been shipped. The words "whenever the same may arrive earlier or later" did not occur in the contract between the plaintiffs and their vendors. I think they were designedly used in the contract (Exhibit 15) to provide for late shipment. Such late shipment may be in August 1918 at any time after the date of the contract, or it may even be in September 1918. I say late "shipment" for, as held by the Court of Appeal in Vallabhdas Kanji v. Runchordas Mathuradas [Original Civil Jurisdiction Suit No. 1717 of 1919: Appeal No. 18 of 1920, decided by Macleod and Fawcett J. on 8th July 1920] the word "late" has reference to "shipment" and not to "arrival". The provisions for late shipment had to be made in view of the War conditions prevailing at the time. The fact that those conditions were present to the minds of the parties appears from the Contract itself. The goods were to be delivered on the safe arrival thereof by steamer. Those conditions cannot be ignored in determining the question before us. The existence of those conditions influenced the judgment of the Court of Appeal in the aforesaid case.

15. Let us now turn to what actually happened after the date of the contract. It seems that there was no communication between the plaintiffs and defendants

after the date of the contract until the 25th September 1918. On that date the defendants for the first time addressed a letter to the plaintiffs stating that, unless the goods were delivered within eight days from the receipt thereof, the contract should be treated as cancelled. The eight days" period expired on the 3rd October 1918 and the goods arrived on the 12th October 1918. The defendants stated in their evidence that had the goods arrived on or about the 3rd October 1918 they would have taken delivery thereof. They said that they had to write the letter of the 25th September 1918 because their purchasers told them that they would not take delivery of the goods unless they were delivered to them within eight days. It seems to me that the real reason for the action of the defendants in repudiating the contract was not because they or their purchaser wanted the goods within eight days but because there was a fall in the piece-goods market.

16. The defendants in their evidence cited instances of goods of March-April 1918 shipment ordered out by them from Japan having arrived in Bombay in June 1918. They also mentioned other instances in which the goods arrived within a month or two from the date of the shipment mentioned in the contracts. But those goods were glassware, hardware, canvass, toilet, etc. None of the goods were piece-goods. The defendants, though they say they are merchants in a very large way of business, have not adduced evidence of a single case in which piece-goods from Japan arrived within the same short period. In the present case the defendants knew that the goods had not arrived at the date of the contract. It can of, therefore, lie in their mouths to say that they expected the consignment of the twenty-five bales to arrive in Bombay within the same short period.

17. There is one more point to be noted in this connection. The correspondence between the parties commenced on the 25th September 1918 and it ended on the 12th November 1918. The position first taken up by the defendants in correspondence was that they were prepared to take delivery of the goods if the plaintiffs proved that the goods were of February-March 1918 shipment (vide defendant's letter of 22nd October 1918). Where the plaintiffs pointed out by their letter of the 30th October 1918 the clause as to late shipment, the defendants turned round and by their letter of the 5th November 1918, they set up a new case altogether. In that letter they stated that the contract (Exhibit B) was entered into through brokers and that that defendants were clearly given, to understand that the goods would arrive by any one of the large batches of steamers expected to arrive shortly in Bombay and that, though one such batch did arrive in Bombay within a week or so from the date of the contract, the goods did not arrive. There is not a word about this representation in the written statement of the defendants; nor was any issue raised on it by Counsel for the defendants. In the course of the cross-examination of the plaintiffs Mr. Lalji introduced the alleged representation by the brokers, but as the defendant's case, as disclosed in their written statement, was not based on any such representation, I disallowed all questions bearing on that point.

18. On the whole, I hold that when the parties entered into the contract (Exhibit B) on the 21st August 1918, the late shipment contemplated by them was not only the shipment made subsequent to March 1918 and prior to the date of the contract (if any such shipment was made at all), but a shipment made within a reasonable time from the date of the contract. I hold therefore, that the shipment that arrived, viz., September 1918 shipment, was contract shipment which the defendants were bound to accept. No doubt the interval between the last date for February-March shipment and the second or third week of September 1918 in which the goods must have been shipped was about five months and a half but the date of the contract between the parties, which was made a little less than five months from the last date for February-March shipment cannot be ignored. In other words, the date of the contract is also a material factor to be considered and coupled with it the terms of the contract.

19. The only other question is as regards damages. It was conceded by Counsel for the plaintiffs that the property in the goods did not pass to the defendants, and that the plaintiffs were entitled to damages only. The date of the breach is 15th October 1918 on which day the defendants first repudiated the contract. No doubt, the defendants wrote on 25th September 1918 stating that unless the goods were delivered within eight days the contract should be treated as cancelled, but it was not followed as it ought to have been, by any notice of cancellation. I find that the rate on 15th October 1918 was Rs. 2-4-0 per piece. The damages, therefore, amount to Rs. 10,000.

20 The result is that there would be a decree for the plaintiffs for Rs. 10,000 costs, interest on judgment at six percent.