

(1909) 05 CAL CK 0027
In the Calcutta High Court

Finlay Muir and Co.

APPELLANT

Vs

Radhakissen Gopikissen

RESPONDENT

Date of Decision : 03-05-1909

Acts Referred:

Contract Act, 1872 — Section 120

Citation : (1909) ILR (Cal) 736 : 3 Ind. Cas. 185

Hon'ble Judges : Harington, J

Bench : Single Bench

Judgement

Harington, J.—The plaintiffs' claim is for the price of goods bargained and sold; the defendants plead that the action does not lie and that the goods were not shipped under the contract.

2. The facts which have been proved or admitted before me are that by a contract dated March 7th, 1908, the plaintiffs agreed to sell, and the defendants to buy 15 bales of grey C. B. dhooties of the size and quality described in the contract at Re. 1 per pair; shipment to be in April-May 1908; delivery to be taken within 90 days of arrival; interest to be charged at 12 per cent, on payments made after 45 days from actual delivery.

3. A number of bales of dhooties arrived in the Sections Sparta on April 15th fifteen bales out of this lot were selected by the plaintiffs' sale-master to be delivered to the defendants in fulfilment of this contract and were divided into two lots, eight bales for the April shipment and seven bales for the May shipment.

4. Out of the first lot of eight bales, the defendants took delivery of two bales on April 16th. An extension of time was granted under the terms of the contract for taking delivery of the remaining bales, which were to be delivered-six bales by August 13th and the remaining seven by September 12th. A few days after the two bales had been delivered, the defendants complained that they were inferior to sample and were damaged by mildew. An allowance of Rs. 15 a bale was, accordingly, made by the plaintiffs for mildew damage. The other questions were

referred to the arbitration of the Bisngal Chamber of Commerce under the latter portion of Clause 2 of the contract of March 7th. The question of mildew damage was struck out in the letter of reference to the Chamber of Commerce. The plaintiffs say that this was because while they disputed the buyers "complaints as to inferiority of quality, they were quite prepared to allow an abatement of price for any mildew damage which might be proved. The defendants say they consented to strike out the words, because the plaintiffs promised that if the goods were mildewed the contract should be cancelled.

5. On this point I believe the plaintiffs and not the defendants. First, because I think it very improbable that the plaintiffs would have agreed to cancel the contract on account of mildew damage when it was customary in the trade, as stated by the defendants' witnesses, to make an allowance in respect of such damage. Secondly, because the defendants have not pleaded that the plaintiffs agreed to cancel the contract if the goods were proved to be damaged by mildew. Thirdly, because when the plaintiffs offered in their letter of October 17th, 1908, to make any reasonable allowance for damaged bales, the defendants' attorneys while objecting to take damaged bales said nothing about any promise by the plaintiffs to cancel the contract if the bales were damaged.

6. The letter of reference to the Bengal Chamber of Commerce was signed by the plaintiffs and by the defendants on April 22nd, 1908, and related to the inferiority of quality of the whole fifteen bales. On May 6th the arbitrators made an award to the effect that they found that the goods were a fair tender in every respect, and that the buyers were to take delivery of them under the terms of their contract.

7. Nothing further was done until July 25th when Brojo Lal Mookerjee wrote to the plaintiffs claiming to cancel the contract on the ground that the goods were not of the shipment contracted for. In reply, the plaintiffs disputed the defendants' right to take this course.

8. Further correspondence followed: the plaintiffs pressing the defendant to take delivery of the bales under the contract, the defendants refusing to take them on the ground that they were not of the shipment contracted for. The correspondence ended with a letter of December 23rd, 1908, and on January 21st, 1909, the present suit was brought.

9. In the course of the trial the award of the arbitrators was tendered. It was objected to by Mr. Buckland on the ground that the agreement to submit to arbitration was contained in the contract of March 7th, and that contract did not bear the 8-anna stamp required by schedule I, article 5 (6) of the Indian Stamp Act, 1899, and that as Section 35 of the Act provides no instruments not duly stamped shall be acted on by any person having by consent of parties authority to receive evidence,, the arbitrators were precluded from acting on it their award, therefore, was made without authority and could not be admitted.

10. The plaintiffs contended that the contract of March 7th being an agreement

relating to the sale of goods fell within Exemption (a) to article 5 of the schedule and did not require a stamp, and relied on *Kyd v. Mahomed* 15 M. 150.

11. It is unnecessary to decide whether this objection is sound or not, because the admissibility of the award as evidence against the defendants does not depend on the submission to arbitration contained in the contract. The letter of April 22nd, signed by the defendants (as well as the plaintiffs), contains a request to the Bengal Chamber of Commerce for the appointment of two arbitrators and the issue of an award, and it sets forth in detail the buyers' complaints, and gives the numbers of the particular fifteen bales (37081-95) covered by the contract as to which the dispute has arisen. This letter clearly does not require a stamp, and any award made in pursuance of the authority contained in that letter is evidence against any person who signed the letter authorising the making of the award. The award is admissible in evidence against the defendants.

12. The learned Counsel for the defendants contended that an action for goods bargained and sold would not lie, and that the only remedy the plaintiffs had was to sue for damages u/s 120 of the Contract Act, and he cited the case of *Mitchell Reid & Co. v. Buldeo Doss Khettry* 15 C. 1. But that was a case in which the property in the goods had not passed and so, clearly, a claim for goods bargained and sold was not sustainable. It does not lay down the proposition that where goods answering the description of the goods contracted to be sold have been sold to the buyer, and the property has passed to him, no action for goods bargained and sold can be brought. Section 120 of the Contract Act does not deprive a seller of this form of action which is recognised under the CPC of 1882: see Schedule IV, Form 10.

13. Next, the defendant says he can cancel the contract because the goods were shipped before the contract was made. I do not think that this contention is sound, because the parties have by Clause 5 of the contract agreed that shipment prior to the stipulated time shall not give the buyers the right of cancelling, and, further, I believe that when the defendant took delivery of the two bales on April 16th he knew they were not of the April shipment. He says he did not, but he admits he has been seven or eight years in the piece-goods trade. I do not believe him when he says that notwithstanding his experience, that he did not know that it was impossible for goods arriving in a ship at Calcutta on April 15th to have been shipped during the month of April in Liverpool.

14. The substantial question in the case is whether the contract of March 7th has been converted into a complete bargain and sale by the appropriation of specific goods to the contract, in other words, whether the plaintiffs have only proved the breach of an agreement to sell sounding in damages, or have proved an actual sale passing the property in the goods and rendering the buyers liable to pay the agreed price therefor.

15. Now, there is evidence which has not been contradicted that the plaintiffs did by their sale-master select and appropriate fifteen specific bales to the contract in question.

16. The question then arises, did the defendant assent to the appropriation of these fifteen specific bales to the contract?

17. I think that the defendants' letter to the Bengal Chamber of Commerce on April 22nd is evidence of an assent to the appropriation. They request the Bengal Chamber of Commerce by their arbitrators to ascertain whether these specific bales described by certain specific marks are inferior in quality to the goods deliverable under the contract. That seems to me to be consistent only with an assent to the plaintiffs' appropriation of those specific bales, and further, in their letter, they do not claim to be entitled to refuse the bales but say that they want an allowance. The position of the parties at the time of the reference was this. The plaintiffs had appropriated certain bales to the fulfilment of the contract with the defendants; the defendants said they were of inferior quality and they wanted an allowance in respect of them. Both the plaintiffs and the defendants wrote authorising arbitrators to make an award on the question whether goods are inferior or not, and whether an allowance ought to be made.

18. In my opinion, the defendants consented to the appropriation, and the property in the goods passed to them.

19. The result is that the plaintiffs are entitled to judgment.

20. The defendants have not claimed to set-off as against the price any compensation to which they would be entitled in the event of the goods being damaged by mildew. But both parties have agreed that if it be held that the plaintiffs are entitled to recover, the question as to what abatement, if any, of the price the defendants ought to get in respect of mildew damage shall be referred. The reference will be to some gentleman agreed on between the parties : in the event of their being unable to agree, to the Official Referee.

21. The plaintiffs will be entitled to judgment for the amount claimed less the sum, if any, to which the Referee finds the defendants entitled in respect of mildew damage. Costs on scale 2. Liberty to apply to enter judgment in accordance with the Referee's report.