

(1924) 07 BOM CK 0001

In the Bombay High Court

Case No : Suit No. 4285 of 1921 and O.C.J. Appeal No 17 of 1924

Harichand and Co.

APPELLANT

Vs

Gosho Kabushiki Kaisha Limited

RESPONDENT

Date of Decision : 14-07-1924

Acts Referred:

Contract Act, 1872 — Section 107

Citation : (1924) 26 BOMLR 921

Hon'ble Judges : Lallubhai Shah, J;Fawcett, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Fawcett, J.—[His Lordship after setting out the facts of the case and the correspondence between the parties, observed:--] At the trial it was not disputed that the goods tendered to the defendants were contract goods. But it was contended that owing to the bales being described by the figure 10 instead of the figure 9/5 mentioned in the contract, the defendants were not bound to accept the goods. This contention was overruled by the learned Judge in the Court below, and it is now admitted that there was a breach of the contract by the defendants. The Judge held that the date of this breach was April 5, 1921, and though in the judgment he refers to the defendants' final repudiation of May 17, it is clear that this does not affect the previous finding that there was a breach on April 5. We agree there was a clear breach on April 5, 1921, and that this was not affected by the subsequent negotiations which broke down on May 17.

2. The only other point in dispute was whether the plaintiffs were entitled to recover the loss resulting from the resale on May 25 as damages, and on this point the Judge held that, though Clause 15 says the plaintiffs can sell at, any time, this must be taken to mean at any reasonable time. He also held that the plaintiffs were not unreasonable in waiting till May 17 before taking steps to sell the goods, and that the actual sale on May 25 was within a reasonable time of the defendants' final repudiation of May 17. Accordingly he decreed the

plaintiffs" claim.

3. The defendants appeal on the ground that the lower Court erred in awarding damages on this basis, and that it should have held that the correct measure of the plaintiffs' damages was the price of the goods ruling on April 6, 1921.

4. Mr. Coltman for the appellants does not dispute the plaintiffs' right to resell the goods under Clause 15 of the contract, and get the benefit of the special damages stipulated for therein, but he contends that the resale should at latest have taken place within a week of April 5, and that as the plaintiffs failed to do so, they cannot recover damages on the ordinary basis of the difference between the contract rate and the market rate at the date of the breach. Mr. Campbell for the respondents did not dispute the construction put on Clause 15 by the learned Judge that the resale should be within a reasonable time, and it may be noted that the clause does not expressly give the plaintiffs an uncontrolled discretion as to the time or times of resale, as did the contract in *Best v. Haji Muhammad Sait* ILR (1898) Mad. 18. The sole question, therefore, is whether the resale did take place within a reasonable time.

5. The main principles which govern the question as to what is a reasonable time in a case of this kind are, in my opinion, correctly stated in *Prag Narain v. Vul Chand* ILR (1397) All. 535. It was a case falling u/s 107 of the Indian Contract Act, but the judgment proceeds on general principles. It says (p. 539):--

Section 107 in explicit terms requires that if the seller who has a lien for the unpaid price wishes to re-sell the goods sold, he must) allow a reasonable time to elapse between the date of his giving notice to the buyer of his intention to re-sell and the date of the re-sale. But the section does not in terms provide that the right to re-sell should be exercised within a reasonable time from the date of the breach of contract. On this point the section is silent. We have therefore to look to general principles as a guide for determining the question whether a buyer who wishes to re sell the goods sold must do so within a reasonable time from the date on which the contract was broken or whether he may do so at any time after the date of the breach. A buyer, it is true, may claim the price at any time after the stipulated date for payment has expired, if not precluded from doing so by the law of limitation, but if he chooses to enforce his right to re-sell, he must, it seems to us, do so within a reasonable time from the date of the breach, and should not allow the value of the goods to depreciate by making undue delay in re-selling them. In *Mayne on Damages*, 5th Ed., p. 176, it is stated on the authority of *Pott v. Flather* (1847)16 L.J.Q.B. 366 that "as there is no obligation on the part of the vendor to sell at all, so if he refrains from selling at the time of the breach he takes upon himself all risk arising from further depreciation." In *Addinon's Law of Contract*, 9th Ed., p. 526, the rule on the subject is thus stated:--"If the goods have been re-sold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of damages will be the difference between the price agreed to be given and the price realised on the re-sale, with the costs and expenses of the re-sale, but if

the re-sale has been unreasonably delayed until the market has fallen, the price realised on such re-sale, will not afford a true criterion of the damage." These are authorities for holding that if the seller elects to re-sell, he must do so within a reasonable time from the date on which the contract was finally repudiated by the buyer. Any other conclusion might cause undue hardship to the buyer, A seller may, with the deliberate intention of causing loss to the buyer, delay the re-sale until the market has fallen and then re-sell the property, and thereby cause to the buyer a loss which he might not have sustained had the re-sale taken place within a reasonable time from the date of the breach of contract. In the case of a re-sale the buyer is entirely deprived of his property and that distinguishes the case of a claim for damages upon a resale from that of a claim for the unpaid price. In the latter case the buyer would get the property and be in a position subsequently to compensate himself by waiting for a rise in the market. In our opinion the plaintiffs ought to have re-sold the shares sold by them within a reasonable time from the date on which the contract was finally repudiated by the defendant in that case.

6. The passages there cited from Mayne's and Addison's works have reference primarily to the case where a resale within a reasonable time may be accepted as evidence of actual value at the date of the breach of contract (of. *Jugmohandas v. Nusserwanji* ILR (1902) 26 Bom. 744, 4 Bom. L.R. 504. But in so far as they are based on the general principle that the seller is bound in all cases to take any reasonable steps which are open to him to reduce his loss (of. Halsbury's Laws of England, Vol. X, Section 615 at p. 335) they seem to me to apply equally to a case of this kind. This general principle is enacted in the Explanation to Section 73 of the Indian Contract Act, and qualifies the plaintiffs' right to recover the resulting loss from the resale of May 15 as compensation for a loss "which the parties knew, when they made the contract, to be likely to result from a breach of it." As an illustration of its application reference may be made to *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited* [1912] A.C. 673 where it is laid down that in assessing damages for breach of contract the fundamental basis is compensation for pecuniary loss naturally flowing from the breach, but this is qualified by the plaintiff's duty, to mitigate the loss consequent on the breach, and he cannot claim any part of the damage which is due to his neglect to take such steps. And in *Jamal v. Moolla Dawood Sons & Co* ILR (1915) Cal. 493, p.c. their Lordships at p. 502 say:--

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect.

7. This necessarily applies with a special force to a case like this where the market value of the commodity re-sold is subject to daily or similar rapid fluctuations. In the present case it is common ground that the market was falling throughout April and May 1921, and references to this are contained in the

correspondence It is probable, as the plaintiffs allege, that the defendants wanted to back out of their contract on this account, and the objection they raised to accepting the goods is now admitted to be untenable. In these circumstances it may be said that plaintiffs might reasonably wait for some time before taking the extreme step of reselling the goods, in the hope that defendants would not persist in their refusal. And if there had been in April any indication of a weakening on defendants' part, e.g., by a proposal such as they made in their solicitors' letter of May 2, so that negotiations could be said to have been going on, I would concur with the learned Judge's view that the plaintiffs were not unreasonable in waiting till May 17. But the clear facts are that the defendants met the threats of a resale, which plaintiffs gave in their letters of April 12, 18 and 20, either by silence or a mere reference to their definite refusal of April 5. See defendants' letter of the 19th and their solicitors' letter of the 21st. Having regard to the plaintiffs' duty to take all reasonable steps to mitigate the damages and to the falling market, I can see no sufficient justification for the plaintiffs not acting on their solicitors' notice of April 26 that they would resell the goods, unless the defendants took the bales within two days. I think that plaintiffs should in fact have taken steps for a resale after receipt of the defendants' letter of April 21, and that the sale should have taken place at any rate by April 29, i.e., after the expiry of the two days mentioned in the notice of April 26. The falling market made it incumbent on them not unduly to delay the sale after the defendants' refusal to accept the goods had become as definite as it did on April 19 and 21.

8. In these circumstances, it seems to me that the plaintiffs cannot properly take advantage of the fact that the defendants entered into negotiations for a settlement in their solicitors' letters of May 2 and 6. And as the parties have not supplemented the contract by any oral evidence, we can only decide this question of reasonableness on the material provided by the correspondence.

9. I do not agree with Mr. Coltman that the sale should have taken place within a week after April 5. In view of the unreasonable nature of the defendants' objection to accept the goods, I think some time may probably be allowed for plaintiffs endeavouring to get defendants to reconsider the refusal, but the delay on this account was, I think, unduly prolonged by plaintiffs, contrary to the general principle I have mentioned.

10. Also some time must of course be allowed for the time taken up in advertising the sale, etc. e.g., a week such as ensued between the plaintiffs' solicitors' letter of May 18, and the actual auction on May 25. To this extent I concur with the lower Court's view that it was not obligatory on plaintiffs to sell at once after April 5, but I think that, in holding that plaintiffs only waited a reasonable time before selling, the learned Judge has not given due weight to the persistence of the defendants in refusing to take the goods in April, and the consequent duty of the plaintiffs not to delay in re-selling in view of the state of the market.

11. The result, in my opinion, is that plaintiffs cannot recover the whole loss resulting from resale of May 25, and are thrown back on their remedy of damages on the ordinary basis of the difference between the contract rate and the market rate at the date of breach, This date may be taken to be the day following the defendants' actual refusal in their letter of April 5, i. e., April 6, 1921, as contended in ground 7 of the memo of appeal.

12. It is true that in *Prag Narain v. Mul Chand* ILR (1897) All. 535 the measure for damages allowed was the difference between the contract rate and the market rate at the expiration of a reasonable time in which the resale should have taken place. But I agree with the following criticism of this decision in *Remfry's Sale of Goods in British India* (p. 406):--

But there seems to be no reason for a departure from the ordinary rule. The right given to the seller includes the right to a reasonable time for effecting a resale, but if he does not exercise the power according to the terms of the section, there is no reason why he should obtain any benefit under it, and the due date should be the day on which to ascertain the market value.

13. The Privy Council decision in *Jamal v. Moolla Dawood Sons & Co* (1915) ILR 43 Cal. 493, p.c. in effect says the same thing in *Angullia & Co. v. Sassoon & Co* ILR (1912) Cal. 568. *Harington J.* took the same view, and this Court agreed with him in *The Narsinggirji Manufacturing Company Vs. Budansaheb Abdulsahab Kaji*, .

14. We, therefore, allow this appeal and declare that the plaintiffs are entitled to recover damages from the defendants on the basis of the difference between the contract rate and the market rate of the goods on April 6, 1921.

15. Before concluding, I desire to add some remarks regarding the validity of a contract like Clause 15 under consideration, and the right of the vendor to recover damages on the special basis therein laid down. Mr. Coltman eventually did not dispute the validity of this right But as some of his arguments suggested the contrary, and my attention has been drawn to *Narsinggirji Manufacturing Co. v. Budansaheb*, which might be held to throw doubt on the right of a seller to recover the stipulated damages under the contract, I wish to give briefly the result of my consideration of the question.

16. It seems to me clear that there is no ground for doubting the correctness of the view taken in *Moll Schutte & Co. v. Luchmi Ghand* ILR (1898) Cal 505, *Basdeo v. John Smidt* ILR (1899) All. 55 and *Best v, Haji Muhammad Sait* ILR (1898) Mad. 18, that a contract like Clause 15 gives the seller a right to resell the goods and sue for the whole damages mentioned therein. It is a right which has been recognised by the Indian legislature in the form of plaint given in the CPC for plaintiffs suing to recover deficiency upon such are-sale (see No. 6 of Appendix A to the Civil Procedure Code, 1908). The case there put as to a resale of goods sold at auction is the one that arose in *Lamond v. Davull* (1847) 9 Q.B. 1030 which is taken as the basis of the law laid down in Section 48(4) of the

English Sale of Goods Act 1894 (56 & 57 Vic. c. 71). See Benjamin on Sale, 6th Ed., p. 1083. This sub-section runs as follows:--

Where the seller expressly reserves a right of re-sale in case the buyer should make default; and on the buyer making default, re sell the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

17. The damages referred to are the same as those recoverable under Sub-section (3) of Section 48, i.e., the amount of the seller's loss is prima facie the difference in the price realised, added to the expenses of the resale. (See Halsbury. Vol. XXV, footnote (p) on p. 264 and foot-note (t) on p. 265.)

18. There is, therefore, the clearest authority for the validity of such a clause. It is not affected by *Jumal v. Moola, Dawood Sons & Co.* for the remarks of their lordships at page 501 show that they held that the stipulation giving the seller the option of reselling the share by auction was merely one that he might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. This was obviously based on the provision that the resale was to take place at the next meeting of the exchange, i. e., almost immediately on the breach. Consequently their lordships held that there was never any sale by auction under the option and that nothing turned upon this provision as to resale.

19. In the remarks of the Subordinate Judge which are cited in *The Narsinggirji Manufacturing Company Vs. Budansaheb Abdulsahab Kaji*, , he takes the view that the authority of *Moll Schutte & Co. v. Luchmi Chand* is shaken by *Angulla & Co. v. Sassoon & Co.* This is clearly erroneous. All that the latter case decides is that, unless the stipulation for a right to resale is so worded as to cover such a case, the right does not extend to goods which have not been ascertained or appropriated for the purposes of the contract. It did not, therefore, cover the case there under consideration which was one of goods in bulk, viz., sugar stored in bags in a warehouse, the particular bags to be delivered never having been selected. But it does not affect the decision in *Moll Schutte & Co. v. Luchmi Chand* so far as it governs a case where the goods have been ascertained and appropriated by the seller to the contract, such as the ten cases of tobacco which were the subject-matter of the contract in that case. Here also the forty-two bales had been ascertained and appropriated to the contract by the sellers: only that appropriation was not assented to by the buyer, so as to make the property in the goods pass to the latter u/s 33 of the Indian Contract Act.

20. In the judgment in *Narsinggirji Manufacturing Co. v. Budansaheb Macleod C.J.* says "the provision in the contract with regard to the vendor's power to sell the goods was unnecessary." With due respect, I think that overlooks that the provision (if it gave a right to recover the deficiency on the re-sale and the costs of the re-sale) gave the seller a valid right to more than his ordinary right to re-sell goods, viz., the right to recover damages on the basis mentioned in the

contract instead of his right of recovering on the ordinary basis of the difference between the contract rate and the market rate at the date of the breach.

Lallubhai Shah, Ag. C.J.

21. As we are differing from the learned trial Judge on the principal question of fact, which has to be decided in this appeal, I desire to state my reasons briefly for the conclusion at which we have arrived. The clause as to re-sale in this case gives the plaintiffs the right to sell the goods at any time. The plaintiffs in fact sold the goods on May 25, 1921, and made their present claim on the basis of the difference between the contract price and the price realised at the re-sale. The learned Judge who tried the suit has come to the conclusion that in doing so they acted reasonably, and has allowed the plaintiffs' claim.

22. In the appeal before us, it has not been contended that such a clause as to re-sale can give the plaintiffs the right to claim the difference between the contract price and the price realised at the re-sale, only if the terms of the clause relating to resale are properly observed. In the present case, it is urged that they have not been carried out in so far as the plaintiffs waited beyond reasonable time in effecting the re-sale. It has not been contended in the appeal before us that even if the plaintiffs are found to have acted within reasonable time in effecting the re-sale they would not be entitled to make the claim on the basis on which it is made. There can be no doubt that such a power of re-sale can validly give the seller a right to claim the difference between the contract price and the price realised at the re-sale, provided he has acted within the terms of the clause. Though it may appear from some of the observations in *The Narsinggirji Manufacturing Company Vs. Budansaheb Abdulsahab Kaji*, that such a clause may not have that effect, I do not think that the point really arose in that case nor do I think it was decided in that sense. In that case the lower Court had dismissed the plaintiffs' suit on the ground that the claim as made in the plaint on the footing of the difference between the contract price and the price realised at the re-sale could not be allowed on the facts of the case and that the plaint could not be amended so as to allow the plaintiffs to claim damages on the basis of the difference between the contract price and the market price. This Court in appeal took the view that even though the plaintiffs' claim as made might not be allowed, it was open to the plaintiffs to claim damages on the footing of the difference between the contract price and the market value of the goods at the date of the breach, apart from the clause as to the re-sale. In fact the decision in *Angullia & Co. v. Bassoon & Co* ILR (1912) Cal. 568. was not followed only to the extent that the amendment of the plaint was not considered necessary. But according to the decisions in *Angullia & Co. v. Sassoon & Co.* and *Moll Schutte & Co. v. Luchmi Chand* ILR (1898) Cal. 505 it is clear that the plaintiffs would have a right to claim the difference between the contract price and the price realised at the re-sale, provided they could be proved to have acted in accordance with the terms of the clause.

23. In the present case the principal point argued is that they have not acted in

accordance with the terms of the clause in so far as they have not acted within reasonable time. Though the clause gives the sellers the power to effect a re-sale "at any time", it is clear that the expression must be taken to mean "within reasonable time". That is the view taken by the learned trial Judge, and that view is not contested before us on either side.

24. Under the circumstances, the only question which has to be decided is whether the plaintiffs acted within reasonable time on the facts of this case. The plaintiffs adduced no evidence, except the correspondence that passed between the parties and their solicitors. It is difficult to say on the correspondence as to when exactly after the defendants refused to take delivery and broke the contract on April 6, they should have acted. As to the state of the market at that time there is no evidence except such indication as we get from the correspondence. Without precise evidence on that point it is difficult to say whether the plaintiffs should have waited for a week or longer after the defendants communicated their refusal to take delivery of the goods from the plaintiffs. But I am satisfied that at any rate by April 29 the plaintiffs should have certainly taken steps to sell the goods, having regard to the fact that the market was going down, and that it could not be reasonable under the circumstances of the case for the plaintiffs to have waited after that date for effecting a re-sale of the goods. Instead of selling the goods soon after the breach they entered into negotiations with the defendants after the defendants had definitely refused to take delivery on April 5 and had three or four times refused to reconsider the matter in April. The negotiations went on from about May 2 to May 17. But nothing came out of those negotiations, and ultimately the plaintiffs sold the goods on May 25.

25. According to my view of the correspondence, which has been referred to in detail by my learned brother, there was a definite breach of the contract by the defendants by April 6, and they definitely insisted upon not taking the goods until May 2. During that interval the limit of reasonable time, within which the power of re-sale should have been exercised by the plaintiffs under the clause as to re-sale was exceeded. The subsequent correspondence only discloses negotiations between the parties which broke off on May 17. To that state of facts the decision in *Jamal v. Moolla Dawood Sons & Co.* (1915) L.R. 43 IndAp 6, ILR 43 Cal. 493 clearly applies. According to the view taken in that case, the only basis upon which, under the circumstances, the plaintiffs would be entitled to damages would be the difference between the contract price and the price of the goods on the date of the breach. I do not read the judgment in that case as casting any doubt upon the proposition, which has been accepted in several cases to which I have referred, that a clause as to resale gives a valid right to the sellers to claim the difference between the contract price and the price realised at the re-sale, provided that power has been exercised in accordance with the provisions of the clause. But where that power has not been exercised within reasonable time, the only right of the sellers is to claim damages on the footing of the difference between the contract price and the market value of the goods on the date of the

breach, without any reference to the price which might be realised by a re-Sale at any time after the limit of reasonable time has been exceeded. My conclusion is that the defendants committed a breach of the contract on April 5 or 6, that a re-sale should have been effected soon after that--at the latest before the end of April--and that the subsequent negotiations and the subsequent re-sale cannot give the plaintiffs the right to claim damages according to the clause as to re-sale. I, therefore, concur in the order proposed by my learned brother.