

(1913) 05 CAL CK 0040
In the Calcutta High Court

Lachminarain Bhareodan

APPELLANT

Vs

Hoare, Miller and Co.

RESPONDENT

Date of Decision : 20-05-1913

Acts Referred:

Contract Act, 1872 — Section 63

Citation : (1914) ILR (Cal) 35

Hon'ble Judges : Chaudhuri, J

Bench : Single Bench

Judgement

Chaudhuri, J.—This is an application on behalf of the defendant company, that having regard to the arbitration clause in the contract in dispute in this suit, all proceedings therein had or taken be stayed, and that the matters in difference between the parties may be referred to arbitration.

2. The contract in suit provides for the delivery of one thousand bales of jute cuttings by the plaintiffs to the defendant company--500 bales during October, 1912, and 500 bales during November, 1912. The contract provides that any dispute arising out of the contract shall be referred to the settlement of an arbitrator or arbitrators appointed by the Bengal Chamber of Commerce, which shall be accepted as final and binding on both parties to the contract.

3. The undisputed facts to be found from the pleadings and affidavits filed in this case in support of the application and in answer to it, appear to be these: that after the contract was entered into, some goods were tendered by the plaintiff firm in respect of the October portion. The defendant company objected, on the 23rd October, 1912, on the ground that the cuttings were nothing like the standard. After some correspondence the plaintiff firm cancelled the contract so far as it related to the October portion. The letter from the defendant of the 18th November, 1912, cancelling the contract in respect of this quantity, was challenged by the defendant company; they said that they refused to treat the contract as cancelled, as they had asked for a fresh tender, and they desired the plaintiffs to arrange for the despatch of one thousand bales without delay. This is

to be found in their letter of the 21st, November, 1912. This dispute seemed, however, to have been arranged after that, and there was a letter on the 30th November, 1912, from the plaintiffs to this effect: "As arranged, please allow us extension to deliver 500 bales due this month under the above contract till the 25th December, subject to "your inspection at our press-house before delivery." The plaintiffs by their letter of the 3rd December extended the time, and said that they granted extension of delivery of the bales under the contract until the end of the month; they added that if the plaintiffs could manage to deliver earlier, they would be obliged.

4. There are certain letters following this, but I need only refer to the letter of the 13th January from the defendants to the plaintiff, in which they say that they would give the plaintiffs three more days to commence delivery, failing which they would bill them for the difference and place the matter before the Chamber of Commerce unless the difference bill was immediately settled. The next letter we have got is one of 7th February, 1913, the plaintiffs having in the meantime sent 375 bales and demanded payment. The defendant company wrote to this effect: "Referring to your bill, you have submitted one L.M."s weighment certificate for 25 bales only. Please send the same for the balance, 350 bales, or we will deduct short weight according to our mill weight." The plaintiff company then demanded payment for the bales delivered. The defendant company said that they were entitled to deduct from the amount what they claimed as, damages and for short weight. The plaintiffs insisted upon their right to be paid for the jute delivered, and they have instituted this suit. The defendant company's present application was resisted by the plaintiffs on the ground that by extension of time for delivery there was a new contract, or, at any rate, a substituted contract. In the plaint some correspondence is set out, and the plaintiff firm therein submitted that they were advised that upon the substituted contract for the delivery of 500 bales for the. October portion, the old contract had come to an end, by reason of the breach on the part of the defendants; and with regard to the November portion also, they said that the original contract was substituted by an agreement under which the time for delivery for the November portion was fixed for the end of December; and then they said that the defendant firm had in fact taken delivery of 375 bales On the 25th January, the price being Rs. 4,875, and they claimed payment for such purchase.

5. Counsel for the plaintiffs contended that by extension of the time for delivery there was a new contract, and therefore the arbitration clause in the original contract was of no avail. Reliance was placed upon the cases of *Stead v. Dawber* (1839) 10 Ad. & El. 57 *Noble v. Ward* (1866) 1 Exch. 117 and also the case of *Cuff v. Penn* (1813) 1 M.& S 21. In *Stead v. Dawber* (1839) 10 Ad. & El. 57 Lord Denman C.J. said that the Court had been called upon to decide a question of fact, namely, what was the intention of the parties in the arrangement come to for substituting the date of delivery for another date. His view was that confusion was created by overlooking the fact that the contract remained, but that the remedy upon it was not of avail, having regard to the statute. His words were:

"Independently of the statute, there is nothing to prevent the total waiver or the partial alteration of a written contract not under seal by parole agreement; and in contemplation of law such contract so altered subsisted between the parties. But the statute intervenes, and in case of such a contract takes away the remedy by action". It was held that the giving of time was, in the circumstances of that particular case, parcel of the contract, and should have been in writing. This case and the case of *Noble v. Ward* (1866) 1 Exch. 117 were considered in *Hickman v. Haynes* (1875) L.R. 10 C.P. 598 by Lindley J. who read. *Stead v. Dawber* (1839) 10 Ad. & El. 57 as a case in which there was a written agreement for the delivery of goods on a particular day, and a subsequent verbal agreement for their delivery on a later specified date; that in those circumstances the Court had held that the parties intended to substitute the later verbal agreement for the previous written agreement. Lindley J. further held that *Noble v. Ward* (1866) 1 Exch. 117 merely showed that a parole agreement to extend the time for performing a contract in writing and required so to be by the Statute of Frauds, does not rescind, vary or in any way affect such written contract, and cannot in point of law be substituted for it.

6. The distinction between a substitution of one agreement for another and a voluntary forbearance to deliver at the request of another was pointed out and recognised in *Ogle v. Eart Vane* (1867) L.R. 2 Q.B. 275; (1868) L.R. 3 Q.B. 272. It was held to be a case of forbearance, not of substitution of one contract for another.

7. Now, in this country we are not affected by the Statute of Frauds, and it seems to me that by the mere extension of time for delivery, the contract does not necessarily become a new contract, but that the promisee gets certain rights u/s 63 of the Contract Act. I am not prepared to accede to the contention that by extension of time alone the old contract is wiped out and a new contract takes its place, and the original arbitration clause ceases to be of any effect. But in this case there is more; when the new arrangement was arrived at, there was a term introduced about the inspection of the goods before delivery in the god owns of the plaintiff. That was an entirely new arrangement, a new term which substantially altered the other terms of the original agreement, and by such addition it seems to me that a new contract can be said to have resulted therefrom. But there is something further. The correspondence does not explain how it was that after the 21st January, the date of the letter from Messrs. Hoare, Miller & Co., and before the 7th February, 1913, 375 bales came to be delivered. There is nothing to show or to indicate what the new agreement or arrangement was between the parties by which, although, according to the letters, the time had long expired, one party agreed to take and the other party agreed to deliver certain quantity of jute. This arrangement seems to be wholly outside the correspondence which I have before me. Under these circumstances I am not prepared to say that the sale upon which this claim is based, viz., of the 375 bales, is covered by the contract in dispute, and a new contract has not been made between the parties. No doubt in the plaint the old contract was referred to

and the goods that the plaintiffs were going to deliver were stated to be goods under the said contract, but that seems to me to be merely descriptive. Under these circumstances I am not prepared to accede, as I have said, to the application made on behalf of the defendant company.

8. Reference was also made to an unreported case of Mr. Justice Fletcher in *Bhikum Chand Charoria v. R. Steel & Co.* Unreported. That case does not seem to me to touch the point raised here. The learned Judge had to decide the question as to how far the original contract was varied by the purchaser saying to the vendor that he objected to the goods which had been delivered by the vendor; that it was open to the vendor to go to arbitration immediately, or to give a home guarantee; that thereafter such home guarantee was given by the vendor; and thereupon the learned Judge held that by accepting the home guarantee the arbitration clause was withdrawn.

9. The costs of this application will be costs in the cause.