

(1926) 05 CAL CK 0017
In the Calcutta High Court

Meghraj Kanyalal and Others

APPELLANT

Vs

Durga Sahai Baldeodas and Others

RESPONDENT

Date of Decision : 17-05-1926

Acts Referred:

Citation : AIR 1927 Cal 291

Hon'ble Judges : Sanderson, C.J.; Rankin, J

Bench : Full Bench

Judgement

Sanderson, C.J.—This is an appeal by the plaintiffs against the judgment of my learned brother Mr. Justice Buckland which was delivered on the 24th of April 1925.

2. The suit was brought to recover Rs. 6,520 which was made up of Rs. 4,496 the principal sum claimed with interest amounting to Rs. 2,023.

3. The plaintiffs alleged that a contract had been made between him and the defendant firm on the 1st of April 1920, whereby the plaintiff agreed to sell to the defendant firm five cases of Hazel Poplins of a certain quality to be shipped in July, August and September 1920 at Re. 1-4-0 per yard on the terms and conditions which are set out at the end of the contract. The plaintiffs further alleged that the defendants raised certain objections as to the quality, finish, and shades but that upon a reference to the Tribunal of Arbitration it was ordered that the goods which had been offered to the defendants were a fair tender and it was further ordered that the defendants should take delivery in terms of the contract. The defendants, however, failed to take delivery and it is alleged that time was extended till the 31st of May 1922 but that even then the defendants failed to take delivery and the plaintiffs resold the goods and the sum claimed was claimed as the difference on the resale or as damages.

4. The defendants by their written statement admitted that they entered into a contract on the 1st day of April 1920 but they alleged that the shipment was to be in July and August instead of July, August and September as alleged by the

plaintiffs, and they further alleged as follows:

At the time of signing the said contract, the defendants entered in Hindi at the foot, of the English writings in the printed contract form the terms and condition regarding quality, number of cases, size, finish and delivery due; dates which were as follows. A translation in English was set out in the written statement.

5. The translation made by the official translator is set out in the learned Judge's judgment and is as follows:

Durga Sahay Baldeo Das. Tussore cases 5 (five cases). Inches 28,29. than of 40 yards, quality No. 10859 at Re. 1-4 per yard. Shipment July, August. Godown due 90 days from the arrival of goods in godown. Finish as given by us.

6. In short, the defendants' case was that there was a concluded contract, which included the writing in the vernacular language which was agreed to by the plaintiffs and by which the plaintiffs were bound.

7. Issues were settled and they are to be found at page 13 of the Paper Book. The main issue was the first one

8. Was there a binding agreement between the parties and if so, what were the terms thereof as to shipment and sample.

9. The learned Judge found that there was no concluded agreement between the parties but that the terms contained in the vernacular writing in the contract constituted a counter-proposal by the defendants. The plaintiffs appellants relied upon the terms of the contract which were in English. The description of the goods was as follows:

5 (five cases each to contain 30 pieces 27"-28." About 40 yards. Quality No. 10859. Hazel Poplin. Shipment July August September 1920 at Re. 1-4 per yard, (rupee one annas four only per yard), and all instructions as advised by mail.

10. Clause 21 provided as follows:

Anything besides plain signature written by the buyers in any native language on the contract shall be null and void and shall not be construed in any way as a part of the terms and conditions of this contract.

11. Sewrattan, a member of the plaintiff firm, gave evidence and stated that he could not read the Hindi writing and I think that according to the evidence on both sides it appeared that the member of the plaintiff firm could not read this particular Hindi-script. It was suggested on behalf of the defendants that the form of the contract, which was a printed form, with the description of the goods in type, was for the use of European firms. There is no evidence as to that, and in this case the form was used by two Indian firms: the plaintiffs and the defendants.

12. It was argued on behalf of the plaintiff that no evidence was admissible except the contract in suit, that Clause 21 excluded any modification which

might. be contained in the Hindi writing, and that if it was admissible to look at the verbal evidence given on behalf of the defendants such evidence was not reliable, and, in short, the contract between the parties was as alleged by the plaintiffs. The defendants' case was that the contract, as originally proposed by the plaintiffs and contained in the printed and type-written terms, was modified as stated in the Hindi writing and they relied on the verbal evidence of the witnesses who were called on their behalf. If the evidence of the defendants' witnesses were to be accepted, the contract in the printed and type-written English terms would not represent the real contract, which was, in fact, arrived at, and this might be a good ground for rectification of the contract. In that case it would not be right to allow the plaintiffs' claim for damages for breach of contract to succeed in this suit. The first question, therefore, is whether the defendants' case should be accepted.

13. The learned Judge said that he did not come to any definite finding as to the facts, as he decided the case upon the document itself, but he stated that if he had to decide he would accept the defendants' case in preference to that of the plaintiffs. The learned Judge in his judgment did not deal with the evidence in detail, but he mentioned two grounds : first, he found it difficult to believe that Sewrattan was exclusively engaged in the matter and that the document was put away without any notice being taken of the vernacular writing. Secondly, because Sukumull was supported by the broker, Ganesh Prosad Khettry, and he saw no reason for disbelieving him.

14. It is necessary therefore for this Court to consider the evidence more closely than was done by the learned Judge, (After examining the evidence his Lordship continued.) Upon consideration of the evidence I am of opinion that the defendants' case, viz., that there was a completed contract made on the 2nd April 1920, upon the terms contained in the Hindi writing on the contract, should not be accepted. I am satisfied that the contract was returned to the plaintiffs by the broker, as described by Sewrattan. There is no doubt that the contract, when so returned, bore upon it the Hindi writing. This writing consists in the first place of the signature of Durga Sahai Buldeodas; then follow the Hindi words the translation of which is set out in the learned Judge's judgment.

15. It remains to consider what is the proper construction of the document. The learned Judge, as already stated, held that

the vernacular words were intended to and do modify the preceding terms in typewriting. Their effect is that of a counter-proposal made by the defendant firm

16. and he decided the case on that footing. In my judgment that is just the kind of thing at which Clause 21 of the contract was aimed, and which it was intended to prevent. There is no doubt that Sukumull signed the contract in the name of the defendants. He alleged that he signed it on the 2nd April. The putting of the signature to the paper was undoubtedly intended as a signing of the contract. It is clear that Sukumull knew about Clause 21 and the terms thereof. His evidence

on this point was not given satisfactorily. When he was first asked in cross-examination about the clause he said:

I am not sufficiently conversant with English so as to read the whole of it and I do not know anything about this term

17. a very explicit statement. Yet, on being further pressed, he had to admit that he had been in the habit of entering into contracts in the form of this contract and that "in every contract that clause is to be found" and that he knew that it was in every contract. He went on to say that he knew the clause was in the contract in suit, and so he wrote out his own terms therein.

18. It must therefore be taken that Sukumull had read the terms of the contract including Clause 21 and understood the effect of them.

19. What then was the effect of his signing the contract?

20. The learned advocate for the defendants argued that the signature should not be detached from the endorsement in Hindi and that the construction should be that the defendants were willing to sign in respect of the sale of goods as specified by the defendants.

21. Again, this seems to me to be just what the terms of Clause 21 were designed to prevent.

22. I do not intend to express any opinion except so far as the facts of this case are concerned, and my decision is confined to these facts. Where, as in this case, the person signing the name of the defendants, signed it intending to enter into a contract, and for his own convenience or for some other reason, wrote a description of the goods in Hindi which differs from the English description of the goods in the contract. I am of opinion that the terms contained in the Hindi writing must be treated as null and void, and cannot be construed or taken as part of the contract by reason of the provisions of Clause 21. It is not really necessary to consider the reason why the Hindi writing was put in the contract. Apparently it is not an uncommon thing for parties to do otherwise there would be no reason for the existence of Clause 12 in all similar contracts, as stated by Sukumull.

23. In this case there is really no material difference between the typed description and the Hindi description except that "September" shipment was omitted from the Hindi writing, for, as already stated, the "finish" was provided for in the phrase "all instructions as advised by mail." The reason therefore in this case for the addition of the Hindi writing may be that Sukumull may have preferred to have the description in Hindi as well as in English and the omission of "September" may have been an oversight, as suggested by the learned advocate for the plaintiffs.

24. It is, however, unnecessary to speculate as to this. The conclusion at which I have arrived on the construction of the document is that the defendants entered

into. the contract contained in the English terms and that such terms cannot be modified or altered by reason of the addition of the Hindi writing.

25. Yesterday the learned adovcate, who appeared for the plaintiffs, drew our attention to the case of Gopi Nath Nandy and Ors. v. Nilambar Sita Nath Kundu which was decided in December 1914 by Sir Lawrence Jenkins and Mr. Justice Woodroffe. The case was not reported : the learned advocate stated that he had ;given notice to the defendants that he would mention it. A clause in the contract in that case was in terms very similar to Clause 21 in the contract in this case and was as follows:

Anything besides plain signatures written by the buyers in any native language on this contract shall be null and void and shall not be construed in any way as part of the terms or condition of this contract.

26. The suit was brought by the plaintiff claiming damages for non-delivery of certain goods. The contract, which was in English, was for 200 tons galvanized corrugated iron sheets. There were written upon the contract in Bengali character above the signature of the plaintiffs" Gomasta the following words, as translated in English : "We have purchased 371/2 tons out of 200 tons, July, August shipment. We shall not take more goods."

27. The defendats relied upon these terms for the purpose of showing that they were not liable to deliver more then 37 tons. The plaintiffs alleged that the terms added in Bengali were a perjury. The learned Judge who tried the case came to the conclusion that he was unable to hold that what was challenged as a forgery was a forgery, but he gave judgment for the plaintiff in respect of the balance of the contracted amount which was undelivered. The matter came before the Court of appeal and I propose to read the learned Chief Justice's judgment which h short and runs thus:

The only question that arises on this appeal is whether the contract was for 200 tons or 37J tons. The contention that it was 371/2 tons rests upon something written in a native language on the contract. But by the express agreement of the parties anything besides plain signatures Written by the buyers in any native language on the contract shall be null and void. We are therefore compelled on the very terms of the contract to disregard the provision written in the vernacular, and it does not appear to be profitable to consider whether it was inserted or not under circumstances of suspicion. On this ground, and on this alone, we dismiss the appeal with costs.

28. It is satisfactory to find that the decision of Sir Lawrence Jenkins and Mr. Justice Woodroffe was to the same-effect as the conclusion at which I had arrived without knowing of their decision.

29. My learned brother and I are of opinion that this case should be disposed of by this Court on the evidence already on the record. We, therefore, propose to hear the arguments of learned advocates on both sides on the other issues, as

hitherto our attention has not been drawn to these issues at all.

Rankin, J.

30. I agree.

Sanderson, C.J.

31. This appeal has been already partly disposed of by a judgment of this Court upon the construction of the contract. The learned Judge who tried the case did not dispose of the other issues. The result of this Court's judgment was that it became, necessary for this Court to deal with the other issues and the learned advocate for the respondents stated the points upon which he intended to rely and the case was argued upon that basis.

32. The first point was that as regards the two cases Nos. 185 and 186 the suit, was barred by the Act of Limitation, The second point was that there was late shipment as regards three cases. The third point was that three out of the five cases were not in accordance with the sample, and the fourth point, which was raised, was with regard to damages.

33. It was stated by the learned advocate who appeared for the appellants that the issue that the cases were not in accordance with the sample was not raised at the trial; and accordingly in this Court that point was abandoned.

34. There remain, therefore, three points which I have mentioned.

35. There is no doubt that the claim is barred so far as the two cases Nos. 185 and 186 are concerned, unless it can be shown that there was an agreement for extension of time for taking delivery. I will deal in detail with that question at present, but I am of opinion that so far as the contract which is the basis, of this suit, namely No. 228, is concerned the plaintiffs appellants have not proved; that there was an extension of time for taking delivery, and consequently in my judgment the suit fails as far as these two cases are concerned.

36. The suit as regards cases 233, 234 and 235 is not barred by limitation for the due date was the 9th of February 1921 and the suit was brought on the 10th of January 1924; the point, therefore, which has to be considered in connexion with these three cases is the question of late shipment. These three cases were shipped in September. The defendants' case is that under the contract the plaintiffs were bound to tender one case at least of July shipment as the provision of the contract was for the sale of five cases and the shipment was to be in July, August and September.

37. The learned advocate argued that as the plaintiff was bound to tender one case of July shipment and as the two cases Nos. 185 and 186 were August shipments, the defendants could not be called upon to take more than two of the September shipment. In my judgment that contention is right, unless it can be shown that the plaintiff's position is saved by Clause 13 of the contract.

38. Clause 13 of the contract is to this effect:

If in any one month one package be shipped in excess of that month's instalments the buyers agree to accept such one package so shipped in excess as aforesaid along with the instalments of that month. If in any one month one package less than that month's instalments be shipped, the buyers agree to take that instalment less the one package so short shipped as aforesaid.

39. In my opinion, Clause 13 does not avail the plaintiffs in this case. It is clear that it was the intention of the parties that each instalment should be regarded as a separate contract that is made plain by the provisions of Clause 18 of the contract. The result, therefore, is that the July, August and September shipments must be regarded as separate contracts and, as stated already, the September contract, in the events which had happened, could not be for more than two cases. In my opinion Clause 13 could not be intended to make the buyer take more than the total amount for which he had contracted. The clause must have been intended to arrange for a month's instalment containing a package in excess of the quantity provided by the contract for that particular instalment, the delivery being within the total amount of the contract quantity.

40. Clause 14 was also relied on by the learned advocate for the plaintiffs. I find Clause 14 is difficult to understand. In any event, in my opinion, it is of no avail to the plaintiff. The blank is not filled in and I am of opinion that this clause as well as the 13th clause must be subject to the implied provision that the buyer is not liable to take delivery of a larger quantity of cases than the total amount provided by the contract. I am, therefore, of opinion that neither the 13th nor the 14th clause is of any avail to the plaintiff in this particular respect.

41. There is a further question whether it can really be said that Clause 13 applies at all. The contract was for five cases. Clause 13 deals with "packages." Whether it can be said that "packages" are the same as "cases" with regard to the facts of this case is doubtful.

42. The result as regards this part of the case, in my opinion, therefore, is that the plaintiff is entitled to recover in respect of two cases only of the September shipment.

43. I have now to deal with the question whether there was an extension of time for delivery. (His Lordship then discussed the evidence and proceeded.) For these reasons. I am of opinion, as already stated, that the alleged agreement for the extension of time for taking delivery has not been proved.

44. The result, in my judgment, therefore, is that the plaintiff is entitled to recover in respect of two cases of the September shipment only.

45. The plaint is based upon a resale and the difference between the amount produced on the resale and the amount which would have been realized if the contract had been carried out by the defendants. The resale, however, did not take place till the end of May 1922. Having regard to the fact that I have come to

the conclusion that there was no agreement for the extension of time for taking delivery, the resale which took place in May 1922, cannot be relied upon by the plaintiffs. The plaintiffs therefore are relegated to any claim for damages which they can prove against the defendants for the breach of their contract in not taking delivery of the two cases of the September shipment at the time when delivery ought to have been taken. There is no evidence as to the market price of these particular goods at the due date, viz., February 1921 On She record. The parties, however, have agreed that there will be judgment for the plaintiff for Rs. 750 as the amount of damages in respect of the two cases of the September shipment.

46. The appeal is allowed and there will be a decree entered for the plaintiffs for Rs. 750. The plaintiffs will be entitled to their costs of the suit in the trial Court and in our opinion it was a fit case to be tried by the High Court. The costs will be on Scale No. 2. The plaintiffs-appellants will be entitled to recover two-thirds of their taxed costs of the appeal from the defendants.

Rankin, J.

47. I entirely agree and have nothing to add.