
(1927) 12 BOM CK 0015

In the Bombay High Court

Case No : O.C.J. Appeal No. 20 of 1927 and Suit No. 556 of 1926

Mohanlal Kashinath

APPELLANT

Vs

Krishna Premji and Co.

RESPONDENT

Date of Decision : 08-12-1927

Acts Referred:

Sales of Goods Act, 1893 — Section 10

Citation : AIR 1928 Bom 170 : (1928) 30 BOMLR 415

Hon'ble Judges : Crump, J; Amberson Marten, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amberson Marten, Kt., C.J.—This is an appeal from a judgment of Mr. Justice Kemp by the defendants who were the purchasers from the plaintiff, of 100 tons of steel baling hoops under a contract of August 17, 1925, providing for shipment in four lots, one in September, two in October and one in November 1925 or earlier. Out of those four lots we are not concerned with one, viz., the September lot. That was taken and paid for. As regards one of the October lots and as regards one other, objections were raised of late delivery. One objection was based on this that the force majeure Clause (No. 3) in the contract with reference to accidents etc. and giving a further time of twelve weeks, did not apply on the facts of the present case. That contention has not been persisted in in this Court.

2. One other contention which was persisted in was that Clause 1 of the contract, which gave an extra fifteen days beyond the period stipulated thereunder, did not apply having regard to the express terms of the document, viz., the provision for shipment which I have already mentioned. In our judgment the learned Judge was clearly right in holding that Clause 1 did apply. Consequently the appellant fails on that point.

3. We are thus left with a comparatively narrow objection to two out of the four

lots, viz., that this was either a c. i. f. contract in substance, or else had a similar effect having regard to the true construction of certain terms and that consequently it was obligatory on the vendors to tender amongst the shipping documents a policy of insurance, and that as the vendors failed to do that, they broke their contract, and cannot succeed in this suit. This is really in the nature of a technical objection, because it is common ground that in fact the goods were duly insured. The policies were put in evidence as Exh. I Moreover, from first to last the defendants never expressly asked for a policy of insurance to be produced, although they did specifically ask, for instance, for proof of the force majeure. They rely on this that we have here a document partly in printed terms and partly in written terms; that the written terms must prevail, and that as those written terms provide that the price is & 11-3-0 per ton c. i. f. c. i. Bombay, that necessarily implies that all the necessary conditions of a c. i. f. contract must be carried out.

4. Now it may be conceded that where there is a contract, such as we have here, partly printed and partly written, special importance should be given to that part of the contract which is written. We may find statements to that effect in *Olynn v. Margetson & Co.* [1893] A.C. 351 and *Paul Beier v. Chotalal Javerdas* I.L.R. (1904) Bom. 17, s. c. 6 Bom. L. R., a decision of Sir Lawrence Jenkins. But that is a very long way from saying that the printed portion is to be neglected. And in my judgment it would be clearly wrong to ignore in the present case the printed portion. The whole of the document both printed and written must be construed, and if possible one intelligible whole made of it.

5. Now turning to the contract itself, there are many indications that this is not a normal c. i. f. contract. What the learned Judge finds in the Court below is that the words c. i. f. apply to the price and not to the entire terms and mode of carrying out the contract, Turning, for instance, to Clause 2 of the contract, it provides that the property in the goods is to be deemed "to have passed to the purchasers as soon as they are delivered to the steamship Co. at the port of shipment, but you will have a lien on goods for the amount of your dues. "That clearly?in spite of an argument to the contrary of rather an astonishing character? is not a normal feature of a c. i. f. contract, as I will presently show on referring to certain well-known authorities on the point.

6. Then a very important clause is Clause 4 as regards payment. It runs:?

We undertake to pay your invoice fully in cash against bill of lading or delivery order for the goods,... within seven days from the arrival of the steamer named on the bill of lading or within thirty days from the date of your invoice whichever should happen first.

7. That is to be read with the clause in the written part of the document, viz., "Payment : Within seven days after the arrival of the steamer."

8. Now we have been treated to an argument that under Clause 4 a bill of lading means all documents, viz., invoice, bill of lading and a policy of insurance, and

that consequently the vendors were in error. One short answer is that this is not what the document says. The document says "bill of lading." That being so, this is not the normal mode of completion of a c. i. 1 contract, nor strictly speaking is the substitution of a delivery order.

9. One case was cited to us, viz., *In re Denbigh Cowan & Co. And R. Atcherley & Co* (1921) 90 L.J.K.B. 836. where the words c. i. f. were used but as regards "payment cash (before delivery if required) against documents or delivery order," what was held there was that the word "documents" naturally meant all the shipping documents, and that the substitution of a delivery order did not mean that it was to take the place of all the documents but only of one of them, viz., the bill of lading. Consequently, as we have not got the word "documents" but "bill of lading," this particular case is against the appellants rather than in their favour, because on that reading it would mean that Clause 4 is to be construed as meaning bill of lading or delivery order in place of bill of lading. Then when we come to Clause 5 of the contract, it provides that the purchasers are to undertake to clear the goods from the docks and that they shall have no objection if the vendors elect to clear the goods themselves. Again that is not an ordinary term of a c. i. f. contract. Here I may draw attention to the written provision about "payment within seven days after the arrival of the steamer." As was pointed out by counsel for the respondents, in the first place the arrival of the steamer has normally nothing whatever to do with an ordinary c. i. f. contract. If the steamer, for instance, did not arrive then under the suit contract the obligation would be at an end. If on the other hand the steamer did arrive, then under the contract there would still be seven days before it would be obligatory on the purchasers to pay. That is not a condition of a normal c. i. f. contract. Further, supposing the steamer discharged the cargo, say within one or two days, what is to happen to it pending the rest of the seven days before completion? That again is not a matter which comes under a c. i. 1 contract. The matter is still further complicated by the printed provision in Clause 4 for payment "within seven days from arrival of the atoamer named on the bill of lading or within thirty days from the date of your invoice whichever should happen first."

10. Then we come to Clauses 11 and 13 about insurance. Clause 11 provides that the insurance included in the prices is understood to be f. p. a. (freight paid in advance) for not more than the purchase value, "but if covered otherwise on our request or on your discretion the diiference will be payable by us." Then Clause 13 is important. It runs :?

We shall not be entitled to any insurance claim or moneys to be received from the insurance company in respect: of the goods unless we take delivery from you of the documents by paying the contract price and all your previous dues, if any, within a week of the arrival of the documents.

11. Now, no doubt, it may well be that the defendants were entitled to have these goods insured, and if necessary to have the policy of insurance handed

over to them. But that does not necessarily mean that the technical requirement of a c. i. f. contract, namely, that at completion one of the shipping documents to be tendered against the price must be a policy of insurance, is to be imported into this contract. As I have already mentioned the defendants never even asked for the insurance policies of the first two lots which they bought and paid for. Similarly, as regards the other two lots the defendants never raised this technical objection about the shipping documents, until they went to their solicitors when they took up a totally different position. Even then the correspondence shows that their solicitors never specifically mentioned the policy of insurance. Whether this omission was intentional or not it is unnecessary to speculate.

12. I should here mention that as regards Clause 15, which is a most peculiar clause, the learned Judge took the view that it entirely overrides the written terms of the contract which, if they are inconsistent with the printed terms, are to be treated as a mere request. That clause is not relied on by the respondents before us, and I in no way rely on it as part of my judgment. My opinion is based on the same considerations as if Clause 15 was obliterated from the contract. And I hope it will be obliterated in future from the documents of the respondents.

13. Now that being shortly the position under this contract, it is to my mind quite clear that this document was not an ordinary c. i. f. contract, and that further under the terms of it there was no necessity for the vendors to tender the policy of insurance; but that it was sufficient under Clause 4 to tender the bill of lading. The invoice in the present case had of course been sent long before that. Under these circumstances I need only make a very short reference to the authorities and I only do so at all because the appellants seem to be under some curious misapprehension as to the ordinary attributes of a c. i. f. contract. One of the most lucid and well accepted statements on the point will be found in the judgment of Lord Justice Kennedy in *Biddell Clemens Horst Company* [1911] I.K.B. 934. I need not repeat them, but substantially they amount to this that in an ordinary c. i. f. contract the vendor sends forward the necessary shipping "documents, viz., the bill of lading and policy of insurance, and that they together with the invoice have to be tendered by the vendor or his agents to the purchaser, and that this may be irrespective of the arrival of the ship. This is obviously a convenience to merchants. The Prize Court case of *The Mirmichi* [1915] P. 71 exemplifies this, and shows that normally the property does not pass to the purchaser merely by shipment. Consequently, in that case the fact that the vendor thus retained a *jus disponendi* prevented the property from passing to the buyers.

14. Then there is another useful case which my brother Crump has referred to in *Johnson v. Taylor Bros, and Company, Ltd.* [1920] A.C. 144, where at p. 149 Lord Birkenhead sets out the ordinary conditions of a c. i. f. contract and at pp. 155-156 Lord Atkinson sets out the six things which the vendor is bound to do, viz. :?

First, to make out an invoice of the goods sold. Second, to ship at the port of

shipment goods of the description contained, in the contract. Third, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable despatch to fiend forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price.

15. In *Stein, Forbes & Co. v. County Tailoring Co.* (1916) 86 L.J.K.B. 448 Mr. Justice Atkin, as he then was, deals with the question of the property passing. He says (p. 449):?

It seems to me impossible to lay down a general rule applicable to all c. i. f. contracts. The overruling question is, " Does the intention of the parties appear in the course of the making and the fulfilment of the contract?".... In the present case the goods were shipped at New York on behalf of the plaintiffs, and the bill of lading was taken to the order of the banking firm which financed the transaction for the plaintiffs. On arrival of the ship the plaintiffs had to take up the bill of lading from the bankers, and, as the defendants would not take up the documents, the plaintiffs had to take delivery...from the ship. It seems quite plain that the seller or his banker reserved the *jw disponendi*. It was said that the property parsed to the buyer on shipment, and the seller only received his unpaid vendor's lien. That view seems to we inconsistent with Section 10 of the Sale of Goods Act, 1893, and with every business probability.

16. In the present case the mode of business was that the transaction was financed from London and the bill of lading was sent forward to the plaintiffs in Bombay, and made out to the plaintiffs or order. Normally under a c. i. f. contract, it would be perfectly clear that the property in the goods had not passed, but that is in direct conflict with Clause 2 of the printed terms which I have already alluded to.

17. Then there is the case of *Polenghi Brothers v. Dried Milk Co.* (1904) 10 Comp. Cas. 42 where payment was directed to be in cash on the arrival of the goods against shipping or railway documents, and the goods were sent partly by sea and partly by rail. There what the learned Judge said was that you must construe that contract according to what the intention of the parties actually was. But when you get railway documents muddled up with shipping documents, one could hardly say that that particular case is an example of a normal c. i. f. contract.

18. Then in *Wilson Holgate and Company (Limited) v. Belgian Grain and Produce Company (Limited)* (1919) 25 Comp. Cas. 1, a decision of Mr. Justice Bailhache, that merely amounts to this that it is obligatory under a c. i. f. contract to tender a policy of insurance, and that a mere cover-note will not do. We have nothing of

that sort in the present case.

19. Further, it is unnecessary to deal with the points raised in *Orient Company, Limited v. Brekke & Howlidi* [1913] 1 K.B. 531 and *Manbre Saccharine Co. v. Corn Products Co.* [1919] 1 K.B. 198 that a policy of insurance is not dependent on the safe arrival of the ship or goods. The case of *Manbre Saccharine Co. v. Corn Products Co.* was also relied on in connection with another point, viz., that provided the defendants were entitled to repudiate the contract, it did not matter that a wrong reason was given in the first instance, *Taylor v. Oalces, Roncoroni and Co.* (1922) 38 T.L.R. 517 is also relied on in that respect, But if in the present case the purchasers are wrong on both points, that contention is really immaterial. Of course it is quite clear that a policy of insurance, as I have already said, is one of the documents which a vendor in a normal c. i. f. contract must tender against the purchase price.

20. After carefully considering the contract in the present case and all the surrounding circumstances; I am clearly of opinion that this was not a normal c. i. f. contract, and that consequently the normal requirements of a c. i. f. contract did not apply here. As regards the contract itself, whether one takes the printed portion or the written portion, there is no absolute obligation on the vendor to tender a policy of insurance against the purchase price. Under these circumstances, in my judgment the decision Krishna of the learned Judge is correct, and this appeal ought to be dismissed with costs.

Crump, J.

21. This litigation arises out of a contract of August 17, 1925. It was a contract by which the defendants agreed to purchase 100 tons of steel hoops, shipment was to be in four lots, one in September, two in October and one in November, 1925, The first lot of September shipment arrived in the SS. Japan, and delivery was taken. As to that there is no question in this case. The second lot was shipped on November 3 in the SS. Delhi, and delivery of that was taken by the defendants, they say as being of November shipment. The third and fourth lots, that is to say, the second lot of October shipment and the lot of November shipment, arrived in the SS. Rana on January 8, 1926, having been shipped on November 29, 1925.

22. As to the last two lots a controversy arises. As to the first which arrived in SS. Delhi, it is said that it is not an October shipment, and as to the last two which arrived in 78. Rana defendants' case is that under the contract the plaintiffs were bound to tender a policy of insurance. That ground may be cleared as regards the point relating to the first lot which was shipped about November 8 by the SS. Delhi. It appears to us that by virtue of Clause 1 of the contract that shipment was in time, being less than fifteen days beyond the stipulated period and no more need be said about that.

23. As to the other two lots, the defendants contended that the force majeure clause, viz., No. 3 in the contract, for some reason or other did not apply. It is

fair, I think, to say that that objection was not pressed before us here, and the only point which remains as regards them was that the seller was bound to tender the policy of insurance. The argument, I think, may fairly be summarised as follows :?The contract consists of printed and written terms. That being so, the written terms must prevail over the printed terms. In the written terms the words c. i. f. are used. Therefore this is a c. i. f. contract and (as has been laid down in cases already cited by the learned Chief Justice) under such a contract the seller is bound to tender a policy of insurance. But it is not strictly correct to say that where a contract consists of printed and written terms, the written terms must prevail over the printed terms. The true canon of construction, as I understand it, is that the Court will pay special attention to written terms, but will not neglect the printed terms, and will rather read the contract as a whole remembering that the written terms express more particularly the intention of the parties, and will endeavour if possible to make one congruous whole out of the document. That principle the argument has overlooked.

24. I may say here that Clause 15 has not been relied upon in this Court. It seems to me that what we have to do in this case is, as I have already said, to consider the document as a whole and to consider how the conflicting portions of it?if there are conflicting portions?can most easily be reconciled. In the printed terms the words o. i. f. are nowhere used. But in the written terms the words "Price ? 11-3-0 per ton c. i. f. c. i. Bombay" are used. An examination of the printed terms, as compared with these words, appears to me to indicate that the true canon of construction is this, that the printed terms are intended to govern the performance of the contract, and that the words I have quoted from the written terms are intended to indicate the price to be paid for the goods. If that view is accepted?and I know of no canon of construction on which that view should not be accepted?then all difficulty, I think, disappears.

25. I now turn to the printed terms in this case. It is, I think, at once apparent that there is much in them which is inconsistent with what may be called a normal, c. i. f. contract, In the first place there is the question of the passing of the property in the goods. Under the written terms the property passes as soon as the goods are delivered to the steamship company for shipment. That is not an incident of an ordinary c. i. f. contract. Next as regards the payment Clause 4 says :?"We undertake to pay your invoice fully in cash against bill of lading or delivery order for the goods". That, again, is not an ordinary term of a normal c. i. f. contract. There the seller is bound to tender documents other than the bill of lading.

26. Then it has been pointed out that the words "within seven days from the arrival of the steamer" in Clause 4 introduce something which is quite inconsistent with the normal c. i. f. contract, for the arrival of the steamer is not a matter with which the completion of such a contract is concerned. Then in Clause 5 we find that the seller may, if he wishes, elect to clear the goods himself, that is to say, he may take the goods in performance of the contract, or

he may take the documents in performance of the contract. That is not an incident of a normal c. i. f. contract. I do not think it necessary to labour this point further, because, as I understood him, the appellants' counsel felt himself constrained to admit that this was after all not a normal c. i. f. contract; and really, in the light of that admission, one may almost say *cadit quaestio*. The question that would then arise would be whether there is anything in this contract to impose upon the seller an obligation to tender a policy of insurance against payment of price. There is nothing to that effect in the contract. It is not so distinctly laid down, nor as I read the contract can that be fairly inferred from anything stated in it. Clause 13 comes nearest to it, but it does not necessarily bear that meaning. It means nothing more than that if the purchaser desires to make a claim for insurance, he must get a policy of insurance from the buyer within a week of the arrival of the documents. It is impossible to extend that as meaning that the seller is bound in all cases to tender a policy of insurance.

27. Now, in considering what these parties meant, it is not, I think, unreasonable to consider what they did. It is in evidence?and it has not been contradicted?that as regards the first two lots the sellers sent an invoice to the buyers, whereupon the buyers came to the office of the sellers, settled the exchange and took delivery of the bill of lading and local invoices. No question of any policy of insurance was then raised. And when we turn to the correspondence which began when this dispute arose, what do we find? That correspondence began on November 10, 1925, and up to January 8, 1926, the whole controversy turned upon this, that the goods were not of the contract shipment, and that the defendants were not bound to accept the certificate of force majeure and had nothing whatever to do with any such certificate. Then, on January 13, the matter came to the hands of the plaintiffs' solicitors. They wrote and called upon the defendants forthwith to pay for the goods and take delivery of the bills of lading and the relative documents. The defendants' solicitors answered on January 16, and for the first time raised the question of this being a c. i. f. contract, and they demanded a complete set of shipping documents. But it is very curious that, although the correspondence was carried on at considerable length, there was never any specific mention of a policy of insurance. The only document which they specifically demanded was a certificate of force majeure and they never distinctly stated anywhere that what they wanted was a policy of insurance. From that conduct it is not unreasonable to infer that the parties themselves believed that the policy of insurance was not obligatory before the payment of the price of the goods. For these reasons I agree that this is not a normal c. i. f. contract. It is a contract which must be construed in accordance with its terms, and upon those terms I am unable to hold that it was incumbent on the vendors to tender a policy of insurance to the purchasers. It follows that the appeal must be dismissed with costs.