

(1906) 02 CAL CK 0016
In the Calcutta High Court

Rash Behary Shaha

APPELLANT

Vs

Nrittya Gopal Nundy

RESPONDENT

Date of Decision : 13-02-1906

Acts Referred:

Contract Act, 1872 — Section 39

Citation : (1906) ILR (Cal) 477

Hon'ble Judges : Stephen, J;Harington, J;Francis W. Maclean, J

Bench : Full Bench

Judgement

Francis W. Maclean, K.C.I.E., C.J.—This is an appeal brought by the defendants against a judgment find decree of this Court in favour of the plaintiff in an action for damages for breach of contract to deliver sugar.

2. The plaintiff through his agent entered into two contracts with the, defendants" firm, each for the purchase of 150 tons of Java sugar. The contracts were similar: the portions material to this appeal run as follows:

The shipment of the sugar shall be made during September and October next in lots of about 75 tons in a shipment.... Should the vessel or vessels be lost, or any portion of the goods declared as shipped be short landed, this contract to be void as regards such portion Delivery shall be given and taken from the Port Commissioners" Jetty for ghats and for seller"s godown in Calcutta on arrival of the goods. Terms : Cash before delivery.....

3. The plaintiff"s case was that he tendered the price of the September shipment and of the October shipment, but the defendants wholly refused to deliver the September and October shipments in both contracts. The defendants" case was that the plaintiff refused to take delivery of the September shipment under the two contracts, and that therefore he was entitled to cancel and did cancel the contracts. The first controversy on the facts turns on the question whether the plaintiff tendered to the defendants the price of the September shipment.

4. It appears that the plaintiff received on 20th October from a Small Cause

Court pleader a letter reminding him that he had had notice that the September shipment had arrived on the 11th, and that he had been repeatedly asked to pay and take delivery, threatening unless he paid for, and took delivery of the sugar within 24 hours, the two contracts would be cancelled.

5. The plaintiff alleges that he replied to this letter, through his Solicitor, on October 27th, tendering Rs. 892-8, the amount of the difference between the defendants' purchase and sale to the plaintiff, and that the tender made when the letter was delivered being refused, and no reply being sent, he again wrote through his Solicitor on October 28th, making with this letter a tender of Rs. 12,240, being the full price of the 75 tons of sugar due under the September shipment under one contract, and offering to pay for the balance, i.e. the 75 tons of the shipment under the other contract, on receiving a delivery order for the shipment due under the first contract. The defendants deny the receipt of the letters and of the tender in toto.

6. To prove the delivery of the letters there are produced two peon books, in which the letters are entered, and in which the receipt for the letters purports to be given by Chundra Kumar Gangooly, the defendants' manager.

7. The peon Ramanooj, who professed to have delivered the letters and obtained the signature of Chundra Kumar Gangooly--the clerk Kadernath Bhattacharjee, who wrote and press-copied the letters, and Purna Chunder Sen, who went with the peon and made the tenders, are called.

8. For the defendants, Chundra Kumar Gangooly was called; he denied the signatures in the peon book and the tenders. Other circumstances too were proved, which rendered the plaintiff's story as to the tender very unlikely.

9. The learned Judge, who heard the witnesses, came to the conclusion that the plaintiff had not proved this tender. A comparison of the signatures in the peon book, with an admitted signature of Chundra Kumar Gangooly, raises a suspicion as to (their genuineness, but I do not wish to rely too much upon this. In this conflict of oral evidence on the point, it is certainly very significant that the Solicitor Kamini Kumar Gruha, who is said to have received the instructions, and whose signature the letters are alleged to have borne, was not called, nor was any day-book produced to show that he had been instructed to write any letter or make any tender on the dates, when the letters are said to have been written. In these circumstances we see no reason whatever for differing from the learned Judge in his view that the tender did not take place.

10. The next question is: was the defendant entitled to rescind the contract in toto? This appears to depend upon whether or not the plaintiff refused to perform his promise, within the meaning of Section 39 of the Indian Contract Act. That section runs as follows:

When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the

contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

11. If the present case were governed by English Law the test laid down in *Freeth v. Burr* I.L.R (1874) . C.P. 208 and adopted by the House of Lords in the *Aldersey Steel & Iron Co., Ltd. v. Naylor Benzon & Co.* would seem to apply. These cases were determined after the passing of the Indian Contract Act, but the views of the learned Judges are useful guides in determining what amounts to a "refusal" in cases of the present class. In *Freeth v. Burr* Lord Coleridge said : "I mention that, because it is important to express my view that, in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract." And in the *Mersey Steel Co. v. Naylor* (1884) 9 A pp. Cas. 434 Lord Shelborne, then Lord Chancellor, said: "Upon the other point, I do not think it desirable to lay down larger rules than the case may require, or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one, with which we have to deal. I am content to take the rule as stated by Lord Coleridge in *Freeth v. Burr* I.L.R.(1874) C.R. 208 which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission, if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here."

12. The other learned Lords in substance take the same view. Lord Watson says: "I think it would be impossible for your Lordships to sustain the appeal, unless your Lordships are prepared to hold that any departure whatever from the terms of the contract by one of the parties must be sufficient to entitle the other to set it aside, while Lord Bramwell speaks of a positive refusal."

13. The case in this Court of *Sooltan Chand v. Schiller* I.L.R.(1878) Cal. 252 is not dissimilar from that now before us, and has been cited as an authority in the plaintiff's favour and there it was held that there was no refusal within the meaning of Section 39 of the Indian Contract Act.

14. Mr. Justice Sale has held that the defendants, in the circumstances, were not entitled to rescind, and has given the plaintiff a decree for 5,610 rupees and interest, as damages for the non-delivery by the defendants of the October shipment. The defendants have filed a cross-objection, and it is with this we have now to deal. The defendants say, and have proved, that the September shipment arrived in due course: that the plaintiff received notice on the, 11th October; that the defendants asked him to pay and take delivery; that he failed--not

refused--to do so, and on the 26th October 1904 they wrote and sent him the following letter:

The Court of Small Causes, Calcutta: 26th October 1904. To Babu Nrittya Gopal Nundy, of Chinaputty, Bara Bazar, Calcutta.

Dear Sir,

I am instructed by my clients, Messrs. Rajoni Kanto Baneijee & Co., to draw your attention to contracts Nos. 1144 and 1148, dated 20th July and 26th July 1904, respectively, under each of which you contracted to purchase from them 150 tons Java sugar quality as per standard No. 17 shipment in September and October 1904. The contracts further provide that you are to pay cash before delivery. The September shipment arrived in due course, of which you got notice on the 11th instant. My clients have been repeatedly asking you to pay and take delivery. But you have failed to do so up to date.

I am therefore instructed by my clients to inform you that, unless you pay and take delivery of the sugar within 24 hours from the receipt of this letter, my client will consider the contracts as cancelled for your default.

Yours faithfully, (Sd.) Shama Charan Roy.

15. That letter was apparently received by the plaintiff about 4.-30 on the afternoon of that day. On the 27th the defendants had either on that day or previously entered into contracts for the sale of this very sugar at a large profit in their own favour (see evidence of the Broker, Aghore Coomar Mukerjee, p. 39, line 28). It is an undoubted fact in the case that the market was largely in the plaintiff's favour, the price had risen high above the contract price, so that the probabilities are strongly in favour of the plaintiff never intending to refuse to perform the contract, but on the contrary being anxious to get the goods.

16. The evidence of the defendants' witnesses shows that so far from the plaintiff ever having refused, he was only asking for time to pay, and the broker tells us that on the 27th October, that is to say after the receipt of the letter of the 26th, he saw the plaintiff three or four times about the matter and the plaintiff asked the broker, who appears to have acted as an intermediary between the parties, "why we were pressing him so much: that he would take delivery of the goods." The broker tells us that there would have been no difficulty in getting the difference on the security of the goods, the market being so entirely in the plaintiff's favour. I refer to the following passages in the broker's evidence:

Q.--How long have you known Nrittya Gopal Nundy?

A.--For the last 8 or 9 years. Q.--He is a rich man? A.--Yes.

Q.--Carries on a very large business?

A.--Yes, sugar business. Apart from the sugar business he has some other

business.

Q.--Do you suggest on the 22nd October Nrittya Gopal could not pay Rs. 900?

A.--How am I to say? He did not pay.

Q.--As a matter of fact the market was in his favour?

A.--Yes.

Q.--You, as broker, would not have had any difficulty to furnish him with money on the security of these goods themselves, if he had no other money?

A.--Yes, I could have made that arrangement.

Q.--Can you conceive a man of business should lose about Rs. 10,000 profit and not take that course, when the market is in his favour?

A.--How can I say? He is the best person to answer the question.

Q.--According to you it is inconceivable from the business man?

A.--Yes.

17. Up to the 25th October, it is dear from the evidence of the defendants' witnesses, that there were frequent interviews between the parties, and that so far from the plaintiff refusing to take delivery, he was only asking for time, and then comes the letter of the 26th October, which indicates a pretty clear desire on the part of the defendants to get rid of the contract altogether. The plaintiff's version, however, is different, and his Manager Joy Gopal Pal says:

Chunder Coomar Gaugooly came on the 25th October. I offered to pay him Rs. 800 and also said that after taking delivery of the goods and making up the accounts and finding whatever sum was found due, he would be paid. He said he would not take a single piece less than Rs. 900. After that he left.

18. I accept this evidence with caution as the witness' testimony was not accepted upon the question of tender, but I cannot find that this statement is directly denied by the other side, though there is a reference to the matter of the difference in the evidence of the Broker at p. 86, line 20.

19. It is not improbable that there was some dispute as to the differences, and that this was the cause of the delay in payment, seeing that it would have been so easy a matter, in the then condition of the market, to have obtained an advance on the goods. On the 8th November, the plaintiff duly tendered for the October shipment: the defendants refused to accept the money.

20. It is clear that, so late as the 27th October, the plaintiff was willing to take delivery, but on the 26th, the defendant seemed to have thought they were entitled to rescind, because the price of the September shipment had not been paid. But when the letter of the 26th October was sent, the plaintiff had never said he would not pay, nor refused to accept delivery. In this connection I may

cite the words of Lord Blackburn in the Meney Steel case(1884) 9 App. Cas. 442: "I quite agree that, when there were a certain number of tons of the article delivered, it was a material rait of the contract that the man was to pay, but it was not a part of the contract that went to the rect of the consideration in the matter." There was a delay in fulfilling the obligation to pay the money; it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract, or do I think that there is any sound principle upon which it could do so. I repeatedly asked Mr. Cohen whether or not he could find any authority, which justified him in saying that every reach of a contract, or even a breach, which involved in it the non-payment of money, which there was an obligation to pay, must be considered to go to the root of the contract and he produced no such authority."

21. In these circumstances can it be properly said that, when the letter of the 26th October was sent, the conduct of the plaintiff, in the words of Lord Selbourne, had amounted to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission, if he had the power to rescind, and whether the defendants could accept it as a reason for not performing his part.

22. I do not think there was any refusal by the plaintiff within the meaning of Section 39 of the Contract Act, and in my opinion the defendants were not entitled to rescind on the 26th October. The cross-objection, therefore, must be dismissed with costs, as also the appeal.

Harington, J.

23. I concur.

Stephen, J.

24. I concur.