

(1924) 11 CAL CK 0035
In the Calcutta High Court

T.D. Kumar and Brothers

APPELLANT

Vs

Beruck and Comens

RESPONDENT

Date of Decision : 18-11-1924

Acts Referred:

Citation : AIR 1925 Cal 941

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

Bench : Full Bench

Judgement

Sanderson, C.J.—This is an appeal by the plaintiffs in the suit against the judgment of my learned brother Mr. Justice Pearson, which was delivered on the 18th of June 1923, and by which he dismissed the suit with costs on scale No. 2.

2. There were two contracts made between the plaintiffs and the defendants with reference to steel plates.

3. The present dispute relates to the contract made on the 26th June 1920, whereby the plaintiffs bought from the defendants about 15 tons of mild steel flats- 100 bundles (of which the sizes were given) and 607 bars (of which the sizes were given). The price was at Rs. 15-8 per cwt. c.i.f. Calcutta per Sections "Schieldijk", cash on delivery, which was to be given and taken as follows: Cash against shipping documents on arrival of the steamer.

4. The other contract was made on the same day, and it related to mild steel rounds. The plaintiffs obtained delivery of the subject-matter of that contract, and, there is no claim in this suit in respect thereof. It is only necessary to refer to it on account of the way in which the delivery was dealt with by the parties.

5. The steamship arrived in Calcutta on the 9th of August 1920. It appears that the defendants' vendors had drawn bills on the defendants in respect of these goods and the bills had been discounted by the Mercantile Bank. The defendants, on the 23rd July 1920, wrote to the plaintiffs as follows:

Contract Nos. 1964, 1965 of 26th June 1920.

M.S. Bars ex. Sections "Schieldijk."

We would refer you to our letter of the 7th July handing you copies of our bills for material purchased by you under the above contracts, and we beg to remind you that the steamer is due in port about the end of the month. We trust you are therefore making the necessary arrangements for payment to the Mercantile Bank who will deliver you relative documents for the goods. Failure to do this will probably result in wharfage and other miscellaneous charges being incurred for which you will be wholly responsible as per terms of the above contracts; but we hope you will preclude any possibility of this by meeting your obligation in due time.

6. On the 2nd of August the defendants wrote again to the plaintiffs stating that the steamship had been entered at the Custom House and that the plaintiffs in their interests should file their papers there without delay.

7. The procedure suggested by the defendants in the letter of the 23rd of July was not strictly in accordance with the terms of the contract; but nothing turns upon that in this appeal, because the plaintiffs took no objection to the procedure.

8. In respect of these contracts they paid Rs. 5,000 on account. They obtained a delivery order in respect of the rounds given by the Bank and directed to Cox's Shipping Agency; and by reason of that delivery order, they obtained delivery of the steel rounds.

9. There was some little delay in the payment of the amount due in respect of the contract which is now under discussion. On the 21st of August 1920, however, a sum of Rs. 4,711 was paid in respect of the steel flats to the defendants direct, so that on or about the 21st of August the plaintiffs had paid all that was due from them to the defendants in respect of these two contracts.

10. The contract was a c. i. f. contract as I have already mentioned. The lights and duties of the parties under c. i. f. contracts are well known; and, It is not necessary for me to mention them in detail. It is sufficient to refer to the of *Madkorum Hurdeodas v. G.C. Sett* [1917] 45 Cal. 28 where the late Mr. Justice Mookerjee and I re-stated the well-known incidents of such a contract.

11. Under the contract it was the duty of the defendants to tender the documents which would include the contract of affreightment, insurance policy and in voice to the plaintiffs. That was not done as far as I can understand the facts of this case, which have not been too clearly proved, the plaintiffs never got the bill-of-lading in respect of this consignment; and, it has not been shown that they ever got the policy of insurance.

12. The procedure, which was adopted apparently with the consent of both parties, was that the Bank gave a delivery order in respect of the steel flats, in the same way as was done in respect of the steel rounds, directed to Cox's Shipping Agency, and the delivery order specified the goods as follows: "Ends

white 607, Calcutta 100; 707 in all." These figures corresponded with the figures mentioned in the contract.

13. As far as I can ascertain from the evidence which is before us the landing of these particular goods was finished on or about the 6th of September 1920. One would have expected that Messrs. Cox's Shipping Agency would have delivered the goods to the plaintiffs and, I cannot see any reason, why the plaintiffs should not have obtained delivery on payment of such charges as Messrs. Cox's Shipping Agency were entitled to make. The defendants had received their money, the drafts held by the Bank had been met and the Bank had given a delivery order for the delivery of these goods. However, delivery was not obtained by the plaintiffs, and I am entirely unable to come to any conclusion, upon the meagre evidence in this case, upon the question as to who was really responsible, for the delay in the delivery. It may have been the plaintiffs or it may have been the defendants. I am not able to express any opinion upon that question.

14. The fact remains that the goods were put into the Bonded Warehouse and the Secretary of the Bonded Warehouse Association, on the 7th December 1920, signed a warrant certifying that the goods in question were held in the Bonded Warehouse. That warrant is dated the 6th of September, which I suppose is the date when the goods were put into the warehouse, and the certificate was signed on the 7th of December. The certificate was to the effect that the Mercantile Bank of India Ltd. had deposited the goods, and the certificate apparently was sent to the Bank.

15. There is another fact which is material to this case. It appears that the warrant was endorsed by the Bank to the defendants and endorsed by the defendants to the plaintiffs on or about the 22nd December 1921, so that more than a year had elapsed since the goods were put into the Bonded Warehouse. When that warrant was endorsed in favour of the plaintiffs, it appears that the manager of the plaintiffs went and inspected the goods in question. His evidence was that the goods were not in accordance with the contract. In the first place it was alleged that they were not of the sizes specified in the contract and the marks were not in accordance with the contract and, further than that, instead of there being something like 15 tons, he said that he saw not more than 1 1/2 tons. Learned Counsel for the appellants has stated in course of his argument that if the goods had been found in December 1921 in accordance with the contract the plaintiffs would have accepted them and, consequently, in my judgment, the main question in this case is whether the plaintiffs have proved that the goods which were carried to Calcutta and placed in the Bonded Warehouse were not a sufficient compliance with the contract.

16. As regards the quantity, in my judgment there is really no doubt that there was a short delivery of about 198 pieces or bundles. It has been agreed that the money equivalent in respect of the goods short landed is Rs. 1,310: and the first question which it is necessary for us to decide, is whether the plaintiffs are

entitled to recover in respect of the goods which were short landed

17. It seems to me that if the defendants had carried out their undertaking under the c. i. f. contract completely, the plaintiffs would not have had any claim for the goods which had not been landed. The reason is, that if the defendants had delivered the necessary documents to the plaintiffs the plaintiffs would have been in receipt of the policy of insurance, the bill of lading and the Invoice, and if there had been a shortage in the delivery the plaintiffs would have had their remedy either against the ship or against the Insurance Company as the case might be.

18. The contract, however, was not carried out in the ordinary way and all that the defendants gave to plaintiffs was a delivery order addressed to Cox's Shipping Agency for specific quantities of goods and the specified quantities were not delivered to the plaintiffs. Under these circumstances, I am of opinion that the plaintiffs are entitled to succeed in this suit in respect of the goods which were not landed.

19. Then the only other part of the case which requires consideration, in my judgment, is whether the plaintiffs have proved that the goods which were in fact landed were not in accordance with the contract. The learned Judge has dealt with this matter in a few sentences. He said " The complaint that the goods were not according to contract; is based on what plaintiff says he found on inspection some 18 months after the goods arrived when he should have taken the shipping documents. Assuming it were so, I think his objection comes far too late: but in any case I think (the evidence of the broker Mookerjee may be accepted that he inspected the goods while they were being landed and found them according to invoice." My learned brother pointed out during the course of the argument that the broker Mr. Mookerjee who gave evidence for the defendants and the plaintiffs' manager who gave evidence for the plaintiffs were giving evidence in May 1923, the plaintiffs' manager speaking about the inspection which he had made in December 1921, and the broker Mr. Mookerjee, giving evidence of inspection which he had made in September 1920. Neither of those gentlemen had any note in connection therewith to which he might refer for the purpose of refreshing his memory and, speaking for myself I am of opinion that such evidence is very unsatisfactory in a case of this kind.

20. Although I am not prepared to go so far as the learned Judge and to say that I accept the evidence of the broker Mr. Mookerjee, I am by no means satisfied that the plaintiffs have proved beyond reasonable doubt that the goods, which were in fact landed, were not in accordance with the terms of the contract. Consequently, in my judgment, that part of the appeal fails. In my opinion therefore the appeal ought to succeed to the extent that there should be a decree entered for the plaintiffs for the sum of Rs. 1,310.

21. In this Court the parties will bear their own costs and my reason for that conclusion is that the appellants have succeeded as to a part of the appeal and

failed as to the other part. As regards the costs in the Court of First Instance we direct that the plaintiffs do get the general costs of the suit and one day's hearing.

Buckland, J.

22. As we are modifying the judgment and decree of my learned brother Mr. Justice Pearson I desire to make a few observations.

23. The case as it has, now been presented to us falls under two heads -that of short landing and that of the condition of the goods in respect of marks and sizes. A considerable amount of argument has been directed to the question of delay, but in the very unsatisfactory state of the evidence it is impossible to find any clear reason either why the appellant did not press the defendants to deliver the goods or, on the other hand, why the defendants were themselves not more active in giving delivery and thereby discharging their obligations under this contract; for, I should have thought that from the point of view of either party it would have been to their interest to see that the transaction was terminated. But as I have observed, it is impossible to arrive at any clear explanation for the action or inaction of either party.

24. We are, however, left with a few definite facts; short delivery is based upon documentary evidence and in the judgment of my learned brother it is stated that the plaintiffs made a claim for refund of duty on goods short landed and received Rs. 18-11-0, on that account. I do not think there can be any question, though the fact has been disputed in this Court, that there was a short delivery to the extent of about 198 pieces and to that extent the appellants are entitled to some relief. The point is not one which my learned brother dealt with at the trial and it may be that it was not given the same prominence as it has been given here.

25. The position with regard to the sum which we propose to allow appears to me to be this: as has been pointed out by the learned Chief Justice, the original duty of the defendants was to deliver the proper documents under a c. l. f. contract. That was not done because it appears that the appellants were willing to accept a delivery order instead, and did so in lieu of the documents which otherwise it would have been the duty of the defendants to offer them. Had the defendants delivered the documents which it ordinarily would have been their duty to offer them, the plaintiffs would have their claim, as has been pointed out, either against the ship or against the Insurance Company; but by accepting the delivery order they abandoned their right to proceed against other persons for short delivery. In consideration, the defendants must be taken to have agreed to deliver the full quantity specified and to be responsible for any shortage. That they have not done; and, to that extent they ought to pay compensation to the appellants. That disposes of a portion of the claim.

26. As regards the claim based upon goods not being in accordance with the contract as regards marks and sizes I agree with the observations of my Lord

and have nothing to add.