

(1915) 02 MAD CK 0039
In the Madras High Court

The South Indian Export Co., Ltd.

APPELLANT

Vs

A. Condiah Chetty

RESPONDENT

Date of Decision : 01-02-1915

Acts Referred:

Contract Act, 1872 — Section 52

Citation : AIR 1916 Mad 1066 : 29 Ind. Cas. 712

Hon'ble Judges : Sadasiva Aiyar, J; Napier, J

Bench : Division Bench

Judgement

Sadasiva Aiyar, J.—The defendant (the South Indian Export Company, Limited) is the appellant. The only question in this case is whether Theperumal Chetty and Company, for whom the plaintiff stood surety with, the South Indian Export Company, Limited, was guilty of breaches of the series of contracts (which are set out in the plaint as having taken place between the two Companies) or whether the South Indian Export Company, Limited, was guilty of the breaches. If the South Indian Export Company, Limited, committed the breaches, then the learned Judge's judgment ought to be upheld. If it is the other way, the judgment has to be set aside and the suit has to be dismissed.

2. So far as I could understand the plaint, it is based upon the allegations that Theperumal Chetty would have been justified in repudiating the contracts and putting an end to the same (see paragraph 9 of the plaint) had he known some facts of which he was ignorant, and that he must be treated as having repudiated and put an end to tilit) contracts (the plaint does not say when) and that, therefore, the South Indian Export Company, Limited, had no claim under the contracts or on the guarantee agreements against the plaintiff. It seems to me, strictly speaking, that the plaint discloses no cause of action. It is only if Thepemmal Chetty had properly repudiated the contracts and actually put an end to the same that the plaintiff could argue that the South Indian Export Company, Limited, had no claim against him. Without saying that Theperumal Chetty had actually put an end to the contracts, the statement that Theperumal Chetty

would have been justified in repudiating them shows no legal basis for the suit, which denies that the defendants could take advantage of the terms of the contract. However, at the trial before the learned Judge, the plaintiff seems to have been allowed to base his case on certain vague contentions, which, when crystallized, amount to this. There were certain reciprocal promises to be performed in a certain order by the South Indian Export Company, Limited, and by Theperumal Chetty. One of those promises to be performed by the South Indian Export Company, Limited, was that they should give notices of the arrival of the steamers in which the goods to be delivered by the South Indian Export Company, Limited to Theperumal Chetty had been shipped in accordance with the contracts. Those notices were, in the eye of the law, tenders or offers of performance as to delivery of goods made by and binding upon the South Indian Export Company, Limited. It was further contended that as those tenders or offers were not legally proper offers, the South Indian Export Company, Limited, committed a breach of the said reciprocal promises which they had first to perform u/s 52 of the Indian Contract Act, and that hence the South Indian Export Company had no claim under the contracts against Theperumal Chetty and in consequence, against the plaintiff. (Section 54.) This contention seems to have found favour with the learned Judge.

3. In the first place, I think that none of these notices, Exhibit HL series, (I may say in passing that the obligation to give a notice is not expressly mentioned in the written contracts as one of the obligation which the South Indian Export Company has to perform) is either a tender or an offer in respect of the delivery of the goods which the South Indian Export Company was to deliver under the contracts. We shall assume, however, that one of the implied terms of the contract was that the South Indian Export Company should give reasonable notice that they were ready to deliver the goods in order that Theperumal Chetty might know when to go over to the godowns of the South Indian Export Company and apply for the performance by the South Indian Export Company of that part of the contracts which relates to the delivery of the goods. Such a notice need only have stated, "we are ready to deliver the goods according to the contract. Go over to the godowns within a reasonable time after you receive the notice and take delivery of the goods. If the notices Exhibits ITL, a, 6, did contain words sufficient to give notice of this kind to Theperumal Chetty, they were legally valid notices and the reciprocal promise to give such notices made by the South Indian Export Company, and which promise they had to perform (before Theperumal Chetty had to fulfil his next promise to go to the godowns, apply, for and take delivery of the goods), had been properly fulfilled. (As I said, I am unable to agree with the learned Judge that these notices were in the nature of a tender or an offer u/s 38 of the Contract Act.) The errors (even though deliberate) made in each notice as to the ship by which the goods intended to be delivered are said to have arrived are mere surplusage and it was not shown that such misdescriptions prevented Theperumal from fulfilling his part of the contracts and hence vitiated those notices. As Theperumal Chetty failed to apply

within a reasonable time after the receipt of the notices for delivery of the goods, he failed to fulfil his part of the contracts and he is the person to be charged with the breach of the contracts and the liability for the legal consequences of such breach. (In this view, I need not say much about the error which the learned Judge fell into in his first judgment in treating the bills, Exhibit VII series, as in the nature of tenders or offers, they not having been communicated to Thoperurual Chetty.) The South Indian Export Company had, therefore, a good claim against Theperumal Chetty, and against the plaintiff as his surety, for the performance by Theperumal Chetty of his contracts with the South Indian Export Company. I would, therefore, set aside the judgment of the learned Judge and dismiss the suit with costs.

4. Napier, J.--I entirely agree. It is perfectly clear to me that the learned Judge decided this case on Section 83 of the Contract Act, namely, that he thought there had been an appropriation of certain specific bales by the defendants, which appropriation had been assented to, and that appropriation was not according to the terms of the contract. I refer to the appropriation by the bills. It appears now, and the learned Judge discovered it himself when he came to deal with the later issues, that there never had been any appropriation by bills whatsoever, in that the bills had never been delivered and, therefore, could never have been assented to. The whole basis of the learned Judge's judgment, therefore, goes.

5. It is argued now, not that the notice is of itself an appropriation, but that, as the notice specified goods as coming out of a certain ship although the contract did not provide that the goods should come from that ship, they were bound to deliver the goods from that ship, and they were not in a position so to deliver. It is not made clear on the evidence that they were not in a position to do so, which would have of itself been a sufficient answer. But I am satisfied that there was no such contract, and that the fact that the particular ship was mentioned in the notice does not extend the liability of the defendants. In my view, it has not been shown that the defendants were not ready to perform their part of the contract, whereas it has amply been shown, and it is not denied, that the dealers took no steps to perform their part. It is clear, therefore, that the breach was the breach of the dealers and not the breach of the defendants. In those circumstances on the guarantee of the plaintiff the defendants were entitled to debit the plaintiff with the amount and the suit must be dismissed.

6. The point taken about interest was never raised in the plaint and I am of opinion that the defendants are entitled to debit the plaintiff with the interest as well as the loss from re-sale.