(1919) 01 CAL CK 0001

Calcutta High Court

Case No: None

Bal Mukund Ruia		APPELLANT
	Vs	
Gopiram Bhotica		RESPONDENT

Date of Decision: Jan. 21, 1919

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2

Citation: 60 Ind. Cas. 195

Hon'ble Judges: Rankin, J

Bench: Single Bench

Judgement

Rankin, J.
By a contract of 1st December 1917, made on the ordinary form of the Indian Jute Manufacturer''s Association, the plaintiff agreed to sell to the defendant three lacs of yards of Hessian cloth. The only express terms which require notice are three:

Delivery of the said goods to be given and taken as follows: December 1917.

2. Each month''s delivery to be treated as a distinct and separate contract.

3. Any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce applicable for (he time being for decision, and such decision shall be accepted as final and binding on both parties to this contrast. The award may, at the instance of either party, and without any notice to the other of them, be made a rule of the High Court of Judicature at Fort William.

4. These three terms are all part of the printed form with the exception of the words "December 1917" at the end of the first.

5. The seller by his Counsel has been careful to make clear that it is not disputed that the contract is, by the usage of this market, an instalment contract in so far that

it is open to the buyer to require delivery in separate quantities, at all events if each be not less than 50,100 yards, and in this further sense also that the buyer may, if be likes, require performance as to any such quantity taken separately either by giving due shipping instructions to the seller or by demanding Mill''s yucca delivery orders.

6. Of the three lags of yards contracted for, one-half lac was duly delivered and may now be ignored. No delivery was in fact made of any part of the remainder, which divides itself into three separate lots.

7. The first lot is of 50,000 yards for which a formal shipping instruction for the "City of Calcutta" was given on the 15th of December. Vessel was not ready to load. Or 7th January buyer offers to take at once a delivery order. Delivery having been made in neither form, buyer on the 18th January sends his difference bill by registered post claiming Rs. 6,750. Seller refuses to pay. On the 28th February an arbitration by the Chamber of Commerce is demanded by the buyer, and proceedings, strictly confined to this claim, took their course under this demand, resulting on 24th July in an award of the sum claimed to the buyer with certain interest and costs. This is the first arbitration case.

8. The second arbitration case had reference to 1,00,000 yards for which another shipping instruction was given on 15th December--this time for the "Chile", The seller finding that the vessel would not begin loading till the 2nd of January, disclaimed responsibility. Bayer insisted, On the 7th January buyer asked for immediate shipment or else delivery order. On the 8th buyer sends another difference bill, this time for Rs. 17.700, on the footing of the price at which the goods had been bought against him by his buyer. On the 19th the seller tendered delivery orders which were refused. On the 21st the seller returned the difference bill and claimed to cancel the contract because of that refusal. On some date, before the 9th of April, Kanoria and Co., who had bought from the buyer, claimed arbitration between themselves and him. This had resulted in an award in their favour before the 24th of June. On the 9th of April the buyer''s second case against the seller was commenced, claim being made in the alternative either for the amount of the difference bill or for such sum as might be awarded to Kanoria and Co.

9. The third arbitration case was not commenced till the 21st of June. It concerned two quantities of 50,000 yards each, one for the "Chile" and one for the ''Talabat''. As to this I have only the buyer''s case: the seller''s case never having been lodged. The buyer claimed that shipping instructions were given on 14th and 21st December for these boats respectively; that on 2nd January 1916 he received two letters dated 29th December in which seller said the ''Chile'' was not yet in port and that the ''Talabat'' had left long before due date. That on the 3rd January buyer wrote that the goods for ''Talabat'' should be put on the) ''City of Manchester'' and on the, 4th that he would take Mill''s pucca, delivery order for the other lot. That in the end the seller did neither. That on 15th January the buyer gave notice that his buyers had bought against him as regards the ''City of Manchester'' consignment. That on the

16th he demanded a delivery order for the other lot by the next day, and that next day his buyers had bought against him for this lot also. That the seller refused to recognise this liability. That afterwards buyer settled with one of his buyers on 25th February for 7,250 with seller''s consent and on seller''s promise to pay. That in May he settled with his other buyer for the same sum on the basis of an award obtained against that buyer by a firm to whom he had in turn re-sold.

10. Now, all that seller did in the third arbitration case was, that on the 18th July he applied to the Tribunal for time to file his case, and on 25th July for more time, and in the end was given till 3rd August by a letter dated 27th July.

11. On the 25th July, as I have said, an award in favour of the buyer was made in the first arbitration case between these parties, and by letters of 1st and 3rd August from seller''s Solicitors to the Tribunal, the seller set up his present claim that the Tribunal had no jurisdiction to proceed with the second and third cases, since in the matter of the contract of 1st December there had been an award, which award they say, with complicated in correctness, "has resulted in a decree", it is given as additional ground that the claim in these cases had arisen completely at the time of the Tribunal''s decision. In this action brought by the seller I have to say whether his contention is correct, and whether he is entitled to any relief accordingly.

12. It was argued for the seller that while the contract was for delivery by instalments, it was one single contract in the sense that there was one promise, one covenant to which all the breaches have reference. That once one award is made under the arbitration clause in a complete firm sip able of enforcement at law, the Tribunal unfunctus officio and there can be no jurisdiction to make a second. That in this case all the alleged breaches were complete some time, before the 25th February 1918 when the first arbitration case was started. Thai there was only one cause of action, viz., failure to fulfil the promise to deliver 3 lacs of yards. That the buyer has split up his cause of action and made three cases out of one. And that this course is so unjust and unreasonable that, at all events, the principle which underlies Order II, Rule 2 of the Civil Procedure Code, if not that rule itself, should be applied by me as a ground for holding that the Tribunal has no jurisdiction to entertain the second and third proceedings now.

13. The buyer''s Counsel, in reply, founded upon a custom, alleged in his written statement to obtain in this market, to the effects that when orders for delivery in different lots are given, the original contract becomes divided into as many contracts as there are separate lots.

14. He further raised an issue of fact that, whether such custom exist or not, the seller has by his conduct assented to this contract being treated as several separate contracts.

15. Apart from these questions-of fast, he took certain objection logically prior to these issues. He contended that the. Tribunal hut jurisdiction to decide both these

issues and that they ate not triable by me.

16. He contested the proposition that, apart from such a custom, the first award precluded the Tribunal from entertaining the other cases.

17. As regards the principle of Order II, Rule 2, he said that this objection applied at the initiation of the other cases and that either it does not go to the jurisdiction of the Tribunal,or, if it does, the seller consented to such jurisdiction by filing his written answer in the second case of the 11th June 1918 and by his applications to the Tribunal op 18th and 25th July for time to file his answer in the third.

18. Lastly, and as an answer good in all events, he said that where an arbitrator has any jurisdiction in law no injunction or other relief is obtainable to stay his hand, and the oily course is to take objection when she nullity is sought to be enforced as valid.

19. (A copy of the issues as settled and agreed on is annexed to this judgment)

20. To the contentious of the buyer as to custom, the teller''s Counsel intimated that be would contest the existence of the custom. He argued further that the custom was contrary to the express words "each month''s delivery to he treated as a distinct and separate contract" and was invalid as unreasonable.

21. I agreed that evidence as to the existence of the custom pleaded by the buyer should be reserved until after my decision on the prior points, The documents in the three arbitration cases were prod used and it was agreed that I should decide the preliminary points on these.

22. Now, I will take the contract in the sense admitted by the seller, as stated at the commencement of this judgment, and I will examine as to whether or not he has established that the Tribunal is now without jurisdiction to decide the second and third arbitration cases.

23. I. First, is it true of a submission, such as was in this contract, that under it there can be only one award, meaning thereby a final and complete award inforceable in law. In my opinion there may, be an indefinite number of such awards, as many awards as there are disputes arising out of the contract. The nub-mission, if it be in the terms which are present in this contract, is not exhausted by reason of the mere fact that one award, final and complete in itself, has issued from it. The arbitrators are not functus office, one item of their duty done, their duty remains their duty.

24. The completeness of the first award, so far as regards its own subject-matter, has no relevance to the present point. An award which is incomplete as regards a claim may yet be good if complete as regards those matters in dispute with reference to the claim, which were submitted to the arbitrators. In such a case it is possible to have two awards over the same claim because it is possible to have further disputes over the same claim, disputes not covered by this first award. An award final and complete as regards a claim precludes another as to that claim only,

this, not because the number of awards would be getting high, but because there is nothing further to dispute without disputing the award itself.

25. This is my view of the effect of the unreported case of Chandan Mall v. Donald Campbell of Co. The judgment is printed as Appendix A to --[Ed.] decided in the House of Lords on 4th December 1916. The judgment in the Court of Appeal and the speeches of the Lords of Appeal will be found in the paper-book in Appeal No. 42 of 1917 in this Court. (Suit No. 1094 of 1916). The terms of the submission are for this purpose indistinguishable from those I have to deal with, and will be found at page 170 in the judgment of the present Master of the Rolls. Rule 26 of the Bengal Chamber of Comm54 Ind. Cas. 285erce Rules does not, in my opinion, out down the jurisdiction of the arbitrators to make awards from time to time in disputes arising out of the contract as such disputes arise.

26. II. In the second place, on the footing that the breaches alleged in the latter cases are all breaches of the name promise as grounded the first award, I have to decide whether the arbitrators are without jurisdiction to award upon them now. This contention of the seller must be put upon one or more of the following principles: res judicata, bar by suit, principles of common law or equity analogous to these, or such a construction of the submission as would exclude from its ambit any right to entertain proceedings which, if before a Court of Justice, would be held an abuse of the process of the Court.

27. I think it will re-pay the trouble to make the hypothesis that on 28th February, 9th April and 21st June the buyer had commenced three several suits in a competent Court subordinate to this Court for breaches all prior to the 28th of February and had recovered judgment in the first suit on 2 Ah July. In any case, for the sake of clearness I will do so. I think the position then would have been as follows:

(1). The lower Court would have had jurisdiction to decide whether the later cases come within Explanation IV in Section 11 of the Code. I think it would be bound to hold that they do not: but if they do, and Oudh Court wrongly held that they do not, the only remedy would be appeal. No question of jurisdiction would arise, and no remedy u/s 115 of the Code would be appropriate. Such questions could only arise in a limiting case, e.g., if on the footing that Section 11 did apply the Court had refused to give effect to the law or if it held wrongly on a point quite unarguable.

(2). The same observations apply to a plea under Order II, Rule 2, but with this difference, I think (assuming no such custom as the buyer alleges) that such lower Court, to decide rightly, would have to hold that the later cases were hit by the rule. But again no question of jurisdiction would arise if its decision were merely wrong, if, e.g., it purported to dispense the plaintiff from the provisions of the rule, that would be another matter. It is" to be observed that the presence or absence of a judgment in the first suit would be wholly irrelevant in dealing with this plea.

(3) If, putting aside the Code, the plea to the later suits fell to be considered at Common Law, I think myself that to reject it would be right. Such an objection must be matter of substance and I think has to fulfil certain technical conditions even then. In Brunsden v. Humphrey (1884) 14 Q.B.D. 141 : 53 L.J.Q.B.W : 61 L. & 529 : 32 W.B. 944 : 49 J.P. 4 Bowen, L.J., said: "The rule of the ancient common law is that where one is barred in any action real or personal by judgment, demurrer, confession or verdict, he is barred as to that or the like action of the like nature for the same thing for ever." In the present case and on my hypothesis'', would these actions be "for the same thing" in substance P I think there can be but one answer, and the only way to attempt another is to insist upon the unity of the promise as making the cause of action technically the same. On this I will quote farther from the same great authority: The principle is frequently stated in the form of another legal proverb nemo debet his vescari, proclaim cause It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit? "The principal consideration" says DeGrey, C. J., in Httchin v. Campbell (1772) 2 W.Bl 827 : 96 E.R. 487 is whether it be precisely the same cause of action in both, appearing by proper averments in a plea or by proper facts stated in a special verdiot or a special case." "And one great criterion," he adds "of this identity is that the same evidence will maintain both aotions".... "The question," says Grose. J., in Seddon v. Tutop (1796) 6 T.R. 607 : 1 Esp. 401 : R.R. 274 : 101 E.R. "is not whether the sum demanded might have been recovered in the former aotion, the only enquiry if, whether the same cause of aotiin has been litigated and considered is the former action." It is evident, therefore, that the application of the rule depends, not upon any technical consideration of the identity of forma of action, but upon matter of substance.