(1872) 02 CAL CK 0001

Calcutta High Court

Case No: None

Carr and Others		APPELLANT
	Vs	
Macfarlane and Others		RESPONDENT

Date of Decision: Feb. 21, 1872

Judgement

Sir Richard Couch, Kt., C.J.

Upon the question which was raised by Mr. Marindin at the commencement of his argument, and which was also argued to some extent by the learned Advocate-General, whether the seed was such as was contracted for, I think we cannot disturb the finding of the learned Judge, who evidently had a disposition (I do not say an improper one) to allow the plaintiffs to recover. The learned Judge says in his judgment:-- "I do not think it possible in the face of these statements to infer that the seed which the plaintiffs were ready to deliver was seed of the season 1870-71, as far as it was reasonably possible to procure it. It may have been seed as good or better than the seed of that season, and it may also have been seed which planters generally would be willing to accept; but it is not shown to have been such seed as according to the plaintiffs" own interpretation of the contract, they had contracted to deliver." That certainly appears to me to be borne out by the evidence in the case; and the distinction between the case which Mr. Marindin quoted to us, the Calcutta linseed case of Wieler v. Schilizzi 17 C.B., 619, and the present is, that in that case there was no warranty, but a mere description; whereas in the present case there is a guarantee that the seed should be of the growth of the year 1870-71. The argument in the Calcutta linseed case of Mr. Justice Montague Smith, who was counsel for the defendant, was founded on the fact that there was no warranty. That case does not apply to the present Then, taking it to be proved (and I think it is) that the seed which was sent by the plaintiffs was not such as answered to the warranty in the contract, we have to consider whether the plaintiffs are entitled to recover for the 865 maunds, which the defendants retained, according to the price contracted for, which the learned Judge has awarded to them. I think, upon the evidence of Mr. Wilson, that the defendants must be considered to have accepted the 865 maunds as being in accordance with the contract, although they were not really so, because his evidence shows that after this

seed had arrived, and whilst it was in the boats, samples were taken. Those samples were in the hands of Mr. Wilson, as agent for the defendants, and he must be taken to have had their authority to accept the goods on their behalf. He did in fact act under that authority, and accepted the seed. He had full opportunity of ascertaining whether the 865 maunds answered to the contract. Having had that, he, as he says, gave directions to Peters, who was authorised to act under him, to take delivery of that quantity of seed, and to remove it to the godowns of the defendants, and it was removed. Mr. Wilson, indeed, from his own expressions, felt that he was accepting the seed, but he said he accepted it under a mistake. I think, although he says he did not accept it under the contract; there was such an acceptance, after he had an opportunity of examining the seed, as concludes the defendants from saying that that portion did not comply with the warranty. Now what was the effect of that acceptance? They accepted it at the utmost as a portion of the seed which the plaintiffs contract to deliver. The contract is a contract for the delivery of the entire quantity of 2,000 maunds. It is for "2,000 maunds of fresh, clean, and good up-country indigo seed, guaranteed growth of season 1870-71, at Rs. (sic) per maund, to be delivered at Hajipur in February then next, payment to be made by an approved draft or cheque at 80 days'' date from delivery." It is clearly, as I have said, a contract for the entire quantity of the seed, viz., 2,000 maunds. Now the law upon that is perfectly well understood. I will only refer to the way in which it is stated in Mr. Leake''s book out Contracts, page 33. I select this as giving a very good summary of the decisions bearing upon the point. He says:-- "Similarly, upon a contract with an executory consideration, if the promisee, after part performance of the consideration, refuses to complete it, the promiser may in general treat the contract as rescinded, but in such case, by retaining the part performed consideration, he may render himself liable upon a new contract arising from such executed consideration. Thus, in contracts of sale of a certain quantity of any article, if part only is delivered, and the seller fails to deliver the rest, the purchaser may return the part delivered; but if he elects to keep it after the seller has failed in performing his contract, he is taken to consent to pay the value;'' and he quotes amongst other authorities for that the case of Shipton v. Casson 5 B. & C., 378. In that case, Bayley, J., in his judgment said:-- "Where an entire contract for goods is performed in part, and the whole may be completed, no action will lie in respect of that which has been done, until after the expiration of the time fixed for the completion of the whole. But where some of the goods have been delivered, and the vendee does not return them upon the failure of the vendor to perform his part of the contract, the latter may bring an action for the value (not the stipulated price) of those goods, although he is liable to a cross-action for the breach of his contract." Mr. Leake continues:-- "So, under a contract of sale of goods by description, if the goods delivered are not according to the description, they may be returned; but if they are kept, the seller may claim their value, because, as explained by Parke, J., from the circumstances a new contract may be implied." That agrees with the passage from Chitty on Contracts to which Mr. Evans referred.

2. In this case, although the defendants by the acceptance of the 865 maunds, might have been precluded, and I think would have been precluded, from objecting that that quantity did not correspond with the contract, if the plaintiffs had delivered the remainder of the 2,000 maunds, yet the plaintiffs, not having delivered what they contracted to deliver, can only recover for the 865 maunds as on a new contract; a new contract arising at the time when the goods were accepted, and a contract to pay for the goods according to their value, and not according to the rate stipulated for the 2,000 maunds. The plaintiffs can have no right to recover in accordance with the price in the contract if they have not performed it. To hold they can oblige the defendants to pay for the 865 maunds at the price mentioned in the contract would be making the defendants" conduct in accepting a portion of the goods amount to the entering into a new contract with the plaintiffs to take 865 maunds, and pay for that quantity at the rate of 11 rupees a maund, which certainly was not the intention of the parties at the time the goods were taken out of the boats, and put in the godown of the defendants. This view of the case was apparently not present to the mind of the learned Judge when he made the decree for payment according to the rate mentioned in the contract. The price the defendants ought to pay is certainly not more than what they tendered, looking at the evidence of the falling price in January and February. There must be a decree for 7,785 rupees; and, inasmuch as the result shows that the plaintiffs were entirely in the wrong and ought to have taken that sum, they must pay the entire costs of this suit on scale No. 2.