

(1878) 07 CAL CK 0009

Calcutta High Court

Case No: None

Mahomed Badsha

APPELLANT

Vs

Nicol Fleming and
Others

RESPONDENT

Date of Decision: July 1, 1878

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 32

Citation: (1879) ILR (Cal) 355

Hon'ble Judges: Pontifex, J

Bench: Single Bench

Judgement

Pontifex, J.

In this case Messrs. James Nicol, Fleming & Co., of Calcutta, purchased from one Pestonjee Eduljee a cargo of rice at Chandbally of three different qualities according to sample. A few days afterwards Messrs. Nicol, Fleming & Co. telegraphed to the plaintiff at Madras an offer to sell to him a cargo of rice, which was then at Chandbally by description; and that offer was accepted also by telegram. Two days after the sending of the telegram, Nicol, Fleming, & Co. sent down to Madras three samples of the rice comprised in the cargo, and the samples were received by the plaintiff and were not objected to as differing in any way from the descriptions under which the rice had been sold under the telegram. Subsequently, on arrival of the cargo at Madras, the plaintiff complained that the rice in bulk did not correspond with the samples, and a survey was hold, and in fact the whole dispute in the suit between the plaintiff and Nicol, Fleming as shown by the plaint, appears to me to depend on the question whether the rice in bulk did or did not correspond with the samples which Nicol, Fleming sent to Madras two days after the contract by telegram. If that is so; if Nicol, Fleming sent proper samples of the rice which they had purchased from Pestonjee Eduljee, the same dispute which the plaintiff has with Nicol, Fleming, Messrs. Nicol, Fleming would have with Pestonjee Eduljee, and in fact

the very same question would be in difference between them: Did or did not the cargo of rice in each case correspond with the samples? In this state of circumstances Hadjee Mahomed Badsha has filed a suit against Nicol, Fleming & Co. for breach of contract, on the ground that the cargo did not correspond with the samples; and in this suit Nicol, Fleming & Co. have applied that Pestonjee Eduljee, their vendor, may be added as a party in order that the question, which is common both to Nicol, Fleming and Pestonjee Eduljee, may be tried in his presence, namely, did or did not the cargo correspond with the samples. In support of their application, Nicol, Fleming, & Co. rely on Section 32 of the New Civil Procedure Code. In that section it is enacted, the Court may at any time, either upon or without such application, &c." (Reads second paragraph to word "added"). Now, according to the strict interpretation of the language of that section, I cannot say that, in the suit by the plaintiff against Nicol, Fleming, the plaintiff ought to have joined Pestonjee Eduljee as a defendant; nor can I say that the presence of Pestonjee Eduljee is necessary in order to enable the Court effectually and completely to adjudicate and settle the question involved in the suit between Hadjee Mahomed Badsha and Nicol, Fleming. As between these parties the question can be settled without the presence of Pestonjee Eduljee. No doubt it would be a great saving of expense, and would prevent further litigation, if I were able to add Pestonjee Eduljee as a party; but I find the language of Section 32 does not apply to the case, and on referring to the Judicature Act in England, I find the language of Section 32 is taken verbatim from Clause 13 of Order xvi of the Judicature Act. Now under Clause 18 of Order xvi of the Judicature Act, I think Nicol, Fleming would have been entitled in this case to add Pestonjee Eduljee as a party, or at all events to have been served with notice under the clause. In the appendix there are examples or illustrations given, and all the references are to cases between principal and agent or principal and surety, and most of the cases cited from the Law Reports are cases between principal and agent; but there is one case--Swansea Shipping Co. v. Duncan Fox & Co. (L.R. 1 Q.B.D. 644)--which is certainly an authority to show that if Clause 18 of Order xvi were in force in this Court, Pestonjee Eduljee might be added. I am of opinion that I am not at liberty to construe Section 32 as giving the power under Clause 18 of Order xvi of the Judicature Act. The words of the section do not enable me to do so, and the fact that the words have been taken from Clause 13 of Order xvi shows that it was not intended by the Framers of the Act to make Clause 18 of Order xvi applicable to this Court. I am, I think, compelled to refuse the order, and it must be with costs.