(1869) 06 CAL CK 0045

Calcutta High Court

Case No: None

Robertson, Gladstone and Others		APPELLANT
	Vs	
Kastury Mall		RESPONDENT

Date of Decision: June 7, 1869

Judgement

Sir Barnes Peacock, Kt., C.J.

It appears to me that the decision of the learned Judge is correct, admitting that a portion of the goods had not been landed on 13th May 1868, when the contract was entered into. The contract states, that "the merchants agree to sell, and the dealers to buy, the goods under mentioned at the price specified below, and on the following terms." The goods are those described ex ships named, and the numbers and marks of the bales are given. The contract then states. "the goods are to be cleared and paid for within 45 days from this date." The dealers agreed to boy the goods upon those terms, and the merchants agreed to sell upon those terms. The first act was to be done by the dealers, for they must clear and pay for the goods, the merchants were not bound to send the goods to the dealer, but the dealers were bound to fetch them away, and they were bound to clear and pay for them within 45 days; the merchants were hound to allow the dealers to clear the goods at any time within the 45 days, and if the defendant had gone to the merchants" godown and requested to be allowed to clear and pay for those goods, the merchants would have been liable, if they had refused to allow the dealers to take them away. The defendant not having performed their contract by clearing and paying for the goods within 45 days, there was no condition precedent which it was necessary for the merchants to prove performance of before they could sue the defendant for breach of the contract; the acts to be performed by the merchants, and those to be performed by the dealer being concurrent acts. I apprehend the merchant was bound to prove that he was ready and willing to perform his part of the contract, or to allow the defendant to clear the goods at any time within the 45 days, at which the dealer might think proper to do so. It would not have been sufficient for the merchant, instead of alleging that he always was ready and willing to perform his part of the contract, to have averred that he was ready and willing to

deliver on the last day for the performance of the contract by the defendant, and that the defendant never demanded the performance of the contract within that period. The rule is laid down in Pordage v. Cole 1 Saun. 320, that where two acts are to be done at the same time, neither can maintain an action without showing performance of, or an offer to perform, his part. The same rule is laid down in Peters v. Opie 5 East, 103. From this it appears to me that, independently of the objection which Mr. Justice Macpherson has pointed out in his judgment, the defendant was not bound by this contract with reference to the goods which had not been landed at the time the contract was executed, and the defendant not being bound as to that portion, would not be bound to perform his contract as to the residue. The contract stipulated that "ten days should be allowed from the date of contract for the buyers to examine the goods and claim allowance on the ground of damage, however caused." It appears to me that when the defendant agreed to purchase goods ex the Himalaya and other ships, binding himself not to claim in respect of any damage to the goods for any difference or inferiority in quality or any other defect, unless the claim should be made within ten days, be never contemplated that, in order to examine the goods, it might be necessary for him to go on board the ship or ships, in which the goods had been imported within the Port of Calcutta, for the purpose. Therefore the goods which he intended to buy were goods which were represented to be ex the ships, i. e., landed from the ships, and not goods on board the ships to arrive, or in the course of landing in the Port of Calcutta. I asked Mr. Marindin, in the course of the argument, whether, if damage has been done to these goods in the course of landing in a cargo boat, the loss caused by that damage would have fallen on the defendant; and Mr. Marindin stated that that would be so, for that it was stated in the contract that the goods were to be at the buyer"s risk from the date of the contract. Surely the buyer, when these goods were described as ex the ships in which they had been imported, never contemplated that be was to bear the risk of loss on board the ships either at sea or in port, or in consequence of the sinking of the cargo boat in which they were being landed in the river. For the above reasons it appears to me that, independently of the question of the necessity on the part of the plaintiffs to prove their readiness to perform their part of the contract, the defendant was not bound by this contract to take goods on board the ships, and in respect of which, if the contract was binding upon him, he would have been bound to take the risk of any damage or loss to the goods on board ships, or in the course of landing. The decision of Mr. Justice Macpherson ought to be affirmed with costs.

Norman, J.

2. I am also of opinion that the decision of Mr. Justice Macpherson is correct.

3. The plaintiffs entered into a contract with Kastury Mall Ramgopal to sell, and Kastury Mall Ramgopal agreed to buy, certain goods at specified prices. The goods are 123 bales in all, specially marked and numbered. Then comes this clause: "the goods to be cleared and paid for within 45 days from this date." Now if the contract stopped there, certain specified goods being purchased, and there being a provision that the goods were to be

cleared and paid for within 45 days, then according to the cases cited from Saunder''s Reports, it is plain that the purchaser had the option as to the time at which, within the 45 days, he should clear and pay for the goods.

4. I should feel considerable hesitation in saying that under such a contract, the seller could not recover in an action against the purchaser for not accepting the goods, unless he could show that the goods were landed in big godown, and that he was able at the moment of signing the contract to deliver the goods. It appears to me that the true meaning of the contract in such cases is ordinarily that the parties agree that the delivery should be made, not then and there, but on request within the time mentioned in the contract, and that the seller should be ready to deliver when requested to do so within 45 days. I am far from saying that if, in such case, at the time of the contract, the plaintiffs bad the goods on board ships in the river and that the goods were ready to be delivered, and could have been delivered, and the sellers could show that they were willing to deliver on demand at any time within the 45 days, they would not have sufficiently proved the allegation that they were ready and willing to deliver according to the true construction of the contract and the intention of the parties in making it. I think that the case of Bordenave v. Gregory 5 East, 103, as to a contract to transfer stock, is clearly distinguishable. In that case the contract was to transfer the stock by a certain day, and the transfer could only be effected at a particular place, namely in the Bank of England; and the Court held, that the party who agreed to transfer the stock was bound to show that either there was a tender and refusal, or that he was present at the Bank of England where the transfer was to be made, and waited till the final close of the transfer books of the Bank on the particular day on which he agreed to transfer the stock. There a particular day and time for the transfer had been used for the act to be done, which is not the case here.

5. But, then, there are terms in the contract before us which show that the contract passed the property in the bales at and from the time of the contract. The bales are described as ex, which means out of the ships, not on board, or which were to be landed from the ships. The purchaser was to take the risk of damage from the date of contract. The meaning was that he Was to take the risk of such damage as might affect goods which were on land, certainly not any sea-risks, or any risks of damage to the goods, when they were being landed in cargo boats or otherwise. Now the language of the contract shows that the defendant was not to be subjected to such a risk as I have mentioned. It says, "ten days to be allowed from this date for the buyers to examine the goods and claim allowance on the ground of damage, however caused, difference or inferiority in quality, or any other defect; if no such claim be made within that time, no allowance is to be given."

6. The contract therefore not only represents the goods to be out of the ships, but that they are in some place where they can be inspected during the whole of the ten days. In the absence of any express mention of the place at which they are to be inspected, I think the meaning and legal effect of the contract must be taken to be that they shall be

inspected at the godowns of the plaintiffs. There is a very heavy penalty provided by the contract if the buyer does not examine in ten days, that no allowance is to be given. This shows that the goods were understood to be out of the ships, and in the godowns of the seller.

7. It is clear that the purchaser having bought goods in the godowns of the sellers, Gladstone, Wyllie, and Co. were bound to show that they were ready to deliver, or that they were in possession of goods according to the description of those contracted to be sold. The rule laid down by Mr. Justice Cresswell, in Boyd and Lett 7 C.B. 222, that to sustain the allegation of readiness and willingness to deliver, the plaintiffs would be bound to prove that they were ready and wilting to deliver the identical goods contracted for, appears to me to apply to this case. Messrs. Gladstone, Wyllie, and Co. have been unable to show that they had the goods, or that they were ready and willing, or able to deliver them; and they have therefore failed to prove an allegation, which is material in an action for not accepting goods. On these grounds, I think that the suit has been properly dismissed.