Shree Meenakshi Mills Ltd. Vs Langley and Co.

Court: Bombay High Court

Date of Decision: Sept. 13, 1933

Citation: AIR 1934 Bom 107 : (1934) 36 BOMLR 28 : (1934) ILR (Bom) 288 : 150 Ind. Cas. 49

Hon'ble Judges: John Beaumont, J; Blackwell, J

Bench: Division Bench

Final Decision: Allowed

Judgement

John Beaumont, Kt., C.J.
This is an appeal from a decision of Mr. Justice Kania dismissing a petition to set aside an award. The petition

was based on there being an error of law on the face of the award, and on misconduct by the arbitrators in not having heard evidence as to

damages.

2. So far as the first point is concerned, we have got to be satisfied that there is on the face of the award an error of law. Now the award states

that:

The dispute was regarding fifty bales of the variety of Cambodia cotton, being a part of a contract dated April 30, 1930, which was carried over

till about May 16, 1931, by mutual consent. Plaintiffs wanted to have a specific performance of the contract for these fifty bales on the ground that

the contract was in existence and the cancellation was not in order. All the contracts, telegrams, correspondence, etc., between the two branches

of Messrs. Langley and Co. of Bombay and Coimbatore and the defendants" offices at Madura were put in and carefully gone into and we, the

arbitrators, are of opinion that Messrs. Langley and Co. (i.e. the respondents) did not deliver these fifty bales on May 15, 1931, as demanded by

the defendants, hence they cannot sue for the specific performance of the contract against the defendants, and can only claim the difference

between the rate of the contract and the rate prevailing on May 15, 1931, for the said cotton laid I down in Madura as per rule No. 74 of the by-

law of the East India Cotton Association

and then figures as to the price of cotton on May 15, 1931, are given, and the arbitrators award that the defendants shall pay to the plaintiffs Rs.

2,200, which is the difference between the contract price and the price prevailing on May 15, 1931.

3. It is argued on behalf of the appellants that when the arbitrators expressed the opinion that the respondents did not deliver the fifty bales on May

15, 1931, as demanded by the defendants, that is a finding of breach of contract by the respondents. On the other hand, the respondents argue

that there is no express finding of breach of contract, because there might have been no obligation on the respondents under the contract to make

delivery until they had received payment, or until some other condition had been fulfilled. Be that as it may, it is quite clear that the damages

awarded against the appellants are not based on a failure of the appellants to pay for the goods to be delivered, the damages are based on an

application of by-law No. 74. There was an appeal from the award of the arbitrators to the Board of the East India Cotton Association Ltd., and

the Board dismissed the appeal and directed that the award of the arbitrators be confirmed. By so doing I think that the Board accepted the award

of the arbitrators as a whole. Mr. Colt-man has contended that all that they did was to accept the actual figures of damages awarded, without

approving the reasons of the arbitrators. But when the Board direct that the award of the arbitrators be confirmed, I think that they mean to accept

the whole award as correct. The award being based on the construction of by-law No. 74, we are bound, in my opinion, to look at that by-law,

and if we come to the conclusion that on the construction of that by-law the appellants are not liable for damages, then there is an error of law on

the face of the award.

4. Now, by-law No. 74 provides that if the seller fails to tender a delivery order for the cotton sold or any portion of it or in case the cotton or any

portion of it for which a delivery order has been passed is not actually then ready for delivery in the places therein mentioned, the buyer shall have

the option of one or other of the following courses, one of which he shall be bound to follow, and then the two courses in respect of which the

option is given are, first, that the buyer may buy in the market on the same day at a reasonable rate on account and at the risk and expense of the

seller, or he may invoice back at the spot rate of the cotton contracted for plus the penalty therein mentioned. The argument of the respondents is

that on default in delivery by the seller there arose an absolute obligation on the part of the buyer to adopt one or other of those courses, and that

as he failed to buy in the market on the day on which the seller failed to tender delivery that option went, and he was left only with the obligation of

invoicing the cotton back to the seller, and on that basis it is argued that the damages awarded are correct. In my opinion by-law No. 74 only

applies on default by the seller. The opening words ""If the seller fails to tender"" denote, in my opinion, that there was an obligation on the seller to

make a tender, and he failed in that obligation, and it seems to me that by-law No. 74 operates only to work out the rights of the parties which

arise on the seller making default in delivery. On that event occurring the buyer must do one or other of two things, that is to say, buy in the market

or invoice back. But, in ray opinion, that is an obligation which only arises if he desires to take advantage of the default made by the seller. If he

fails to exercise either of those options, then his remedies against the seller are gone. But it seems to me that we cannot fairly read that by-law as

meaning that if the seller makes default then the buyer is bound to do certain things, and if he does not do them, he is liable in damages to the

defaulting seller. The result of reading the by-law in that way would be to give to a seller in default damages arising out of his own default. In my

opinion that is not a fair or proper construction to put upon the by-law. The whole bylaw comes into operation only when the seller makes default

and regulates the working out of the rights of the parties on that basis. In that view of the matter I think that there was here an error of law on the

face of the award, and that being so, the appeal must be allowed and the award set aside. It is unnecessary to consider the alleged misconduct of

the arbitrators.

5. Respondents to pay the costs of the appeal and the Court below.

Blackwell, J.

6. I agree. The arbitrators having set out the reasons for their awarding Rs. 2,200 to the plaintiffs, namely, that their right to claim that depends

upon by-law No. 74 of the East India Cotton Association which was incorporated in the contract, it seems to me clear that we are entitled to look

at that by-law to see whether upon a proper construction of it as a matter of law the arbitrators have come on the face of their award to a right

decision in law. By-law No. 74 contemplates, in my opinion, a default on the part of the seller in relation to an obligation under the contract,

namely, to tender a delivery order or to take delivery. That would amount to a breach of contract on the. part of the seller, and as far as I can see

by-law No. 74 can only apply upon the assumption that there has been an initial breach of contract on the part of the seller. Mr. Coltman has

argued that notwithstanding a breach of contract on the part of the seller the contract must be treated as still alive for all purposes, involving an

obligation upon the buyer, upon the footing that the contract still exists for all purposes, to adopt one of the two courses therein provided. It is no

doubt open to parties to waive a breach of contract, and Mr. Coltman"s argument really involves this, that by the terms of by-law No. 74 the

buyers have bound themselves to waive a breach on the part of the seller in failing to tender a delivery order. In my opinion that is not a reasonable

or proper construction to put on that by-law. A reasonable effect can be given to the by-law by construing it as meaning that on the breach of a

contract by the seller1 the rights of the buyer under the contract by reason of that breach shall be worked out in one of two ways and in no other.

Such a construction avoids the extraordinary position which would result if Mr. Coltman"s argument prevails, namely, that the buyer must be taken

to have agreed that notwithstanding a breach of contract on the part of the seller he might find himself liable to pay damages. Such a construction is

so unreasonable that it cannot be supposed that a buyer would agree to such a provision.

7. Mr. Coltman has strenuously argued that there is on the face of the award no finding by the arbitrators that Messrs. Langley & Co. committed a

breach of the contract. He has submitted that the words merely mean that Messrs. Langley & Co. did not deliver these fifty bales on May 15,

1931, as demanded by the defendants. There is nothing to indicate on the face of the award whether the arbitrators considered that the demand

was justified, or not justified, or whether Messrs. Langley & Co. were acting within their legal rights in failing to deliver. In my opinion we are not

entitled to speculate upon that matter at all. We can only take the words as we find them and give them such a meaning as we think they must bear

having regard to the remainder of the award taken as a whole. The arbitrators in justification of their award bring in by-law No. 74. That by-law

contemplates a failure by the seller to tender a delivery order. In my opinion that must involve a wrongful failure by the seller, that is a breach of

contract. Consequently, I think that we must read the expression ""that Messrs. Langley & Co. did not deliver these fifty bales on May 15, 1931,

as demanded by the defendants"" as equivalent to a finding by the arbitrators that the sellers had failed to tender delivery within the meaning of by-

law No. 74 which they then invoked for the purpose of awarding damages to those defaulting sellers. In my view the arbitrators have completely

misconstrued bylaw No. 74 as a matter of law. They have, upon the face of the award, shown that they based their award upon that clause, and

therefore there is, on the face of the award, an error of law. Accordingly, in my opinion, the learned Judge was wrong in refusing to set aside the

award and this appeal should be allowed with costs.