(1923) 07 BOM CK 0021

Bombay High Court

Case No: O.C.J. Suit No. 614 of 1923

Steel Bros. and Co. Limited		APPELLANT
	Vs	
Dayal Khatav and Co.		RESPONDENT

Date of Decision: July 23, 1923

Acts Referred:

- Contract Act, 1872 - Section 108, 178

Citation: AIR 1924 Bom 247 : (1923) 25 BOMLR 1063

Hon'ble Judges: Mulla, J

Bench: Single Bench

Judgement

Mulla, J.

After setting out the facts of the case His Lord ship proceeded : At the hearing of the suit evidence was given on behalf of the plaintiffs by Karmali Ebrahim, a partner in the second plaintiff firm, and by Chunilal Mohanlal, an assistant in their firm. On behalf of the defendants evidence was given by Dayal Khatav, a partner in the defendant firm, and by Mr. Monsey Dharsi who had surveyed the goods for the defendants. Mr. Monsey stated in his evidence that he had nineteen years'' experience in rice business and that he was a certified surveyor of the Bombay Rice Merchants Association. He said that he had surveyed the rice, and made his report (Ex. No. 1), and that he gave an allowance of eight annas per bag. He further stated that the difference between Rangoon rice Europe No. 1 and Rangoon rice Europe No. 2 was that while Europe No. 1 did not contain any broken rice, Europe No. 2 contained 10 per cent, of broken rice, and that the rice surveyed by him in the present case contained 40 per cent, of broken rice. Mr. Monsey was not cross-examined by counsel for the defendants, and there can be no doubt on his evidence that the rice was inferior in quality and that the allowance made by him was fair. The merits of the case are entirely on the defendants'' side.

2. The plaintiffs, however, took their stand on the terms of the contract. They contended that the contract being on c.i.f. terms, the defendants were bound to pay

against the shipping documents and they were not entitled to ask for a survey unless they paid the price of the goods. Counsel for the defendants accepted the position that the contract was on c.i.f. terms, but contended that under such contract the plaintiff''s were bound to tender the usual documents of a c.i.f. contract, namely, a bill of lading, a policy of insurance and an invoice within a reasonable time from the date of shipment, that the plaintiffs had none of those documents at any time to tender, that they were bound also to tender the survey report which they never did, that the only document which the plaintiffs offered to deliver to the defendants was the delivery telegram, and even if the delivery telegram was to be treated as a bill of lading, it was not offered to them until December 12, though the plaintiff''s received it on December 5. The plaintiffs admit that there was no bill of lading or policy of insurance, but say that the defendants'' letter of December 13 amounted to a repudiation of the contract, and the contract having been repudiated the defendants were precluded from contending that the plaintiffs had neither of those documents to tender. The defendants deny that there was any repudiation. Such, in brief, are the contentions on either side. Before examining those contentions I shall state briefly the principles by which the present case is governed.

3. Under an ordinary contract on c.i.f. terms the seller has, "firstly to ship at the port of shipment goods of the description contained in the contract; secondly to produce a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available...to the buyer; fourthly to make out an invoice as described by Blackburn J. in Ireland v. Livingston (1872) L.R. 5 H.L. 395 or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage:" Biddell Brothers v. E. Clemens Horst Company [1911] 1 K.B. 214 : [1912] A.C. 18.

4. The bill of lading represents the goods in law and in fact and its possession places the goods at the disposal of the purchaser'' Bowen L.J., in Sanders v. Maclean (1883) 11 Q.B.D. 327 said:

A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo.... It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.

5. The common law drew a distinction between bills of lading and other documents of title, for while a transfer of a bill of lading was always held to operate as a delivery of the goods, a transfer of the delivery order or a dock warrant operates only as a token of authority to take possession and not as a transfer of possession : M''Ewan

v. Smith (1849) 2 H.L.C. 309; Blackburn on Sale, p. 302. This distinction still remains, except in cases under the Factors Act in England, and in cases) under Sections 108 and 178 of the Contract Act in India. But though this is the case, it is open to the parties to a c.i.f. contract to substitute by agreement a delivery order for a bill of lading. Such a variation, it has been held, does not affect the essentials of a c.i.f. contract so as to relieve the seller from the obligation of tendering a policy of insurance to the buyer: Denbigh Cowan & Go. and R. Atcherley & Co., in re (1921) 90 L.J.K.B. 836.

6. The goods comprised in a c.i.f. contract must also be covered by an effective policy of insurance; an open cover taken out by the seller protecting all goods shipped by him is not sufficient: Manbre Saccharine Co. v. Corn Products Co. [1919] 1 K.B. 198. The policy must be tendered even if the goods arrive safely: Orient Com. party, Limited, v. Brekke and Howlid [1913] 1 K.B. 531.

7. A c.i.f. contract is not a mere sale of documents. It is still a contract for the sale of goods, though it is to be performed by transfer of proper documents; Arnhold Karberg and Co. v. Blythe Green, Jourdain and Co. [1916] 1 K.B. 495 and Johnson v. Taylor Bros, and Co., Ld. [1920] A.C. 144. The documents must be tendered as soon as possible after the seller has destined the cargo to the buyer. If there is a mail, the seller must transmit the documents by mail. The contract is performed in fact, and the date of its performance is the date, when the documents would come forward, the seller making every reasonable effort to forward them. In case of non-delivery, the contract is broken at the time when the documents ought to have been tendered, and not when the goods arrive, and damages must be estimated accordingly: C. Sharpe and Co. v. Nosawa and Co. [1917] 2 K.B. 814. The buyer is bound to pay on tender of the shipping documents, and he is not entitled to refuse payment until he is given an opportunity for inspecting the goods: Biddell Brothers v. E. Clemens Horst Co. [1911] 1 K.B. : [1912] A.C. 18.

8. A good deal was said on both sides as to the rule of "anticipatory breach" in its relation to c.i.f. contracts. If is now elementary law that where in a contract for the sale of goods, the buyer clearly shows his intention not to be bound by and to repudiate the contract, it amounts to a breach of the contract: Indian Contract Act, Section 120. In such a case the seller may treat the notice of intention as inoperative in which case he keeps the contract alive for the benefit of the seller as well as his own; or, he may treat the repudiation as a wrongful putting an end of the contract, and may at once bring his action as on a breach of it: Indian Contract Act, Section 39; Frost v. Knight (1872) L.R. 7 Ex. 111. In the latter case, the repudiation operates as a waiver of conditions precedent to be performed by the seller; the buyer cannot, after repudiation, set up as a defence to the action for damages that the goods were not in conformity with the contract: Braithwaite v. Foreign Hardwood Co. [1905] 2 K. B. 543 nor can he, in the case of a c.i.f. contract, raise the defence that the seller had not the proper documents to tender. But the repudiation which absolves the seller

from the performance of conditions precedent must have been made before the due date for the performance of the contract. This date, in the case of a c.i.f. contract, is the date on which the documents ought to have been tendered. A repudiation made after that date does not operate as a waiver of the performance of conditions precedent on the part of the seller.

9. I now proceed to examine the contentions of the parties by the light of the principles set forth above.

10. It was admitted by the plaintiffs that there was neither a bill of lading nor a policy of insurance in the present case. To get over the difficulty caused by the absence of these documents, counsel for the plaintiffs sought to prove that by the usage of the trade in Bombay delivery telegrams passed from hand to hand by endorsement and delivery as did bills of lading and also that telegrams intimating that a specified shipment was insured was treated as a policy of insurance. But as no such usage was pleaded and no issue was raised upon it, I did not allow evidence to be led of the alleged usage.

11. The plaintiffs also offered to prove that though the contract was a c.i.f. contract, the defendants had on previous occasions paid the price against delivery telegrams only. This was objected to by counsel for the defendants, and I held that it was inadmissible. No doubt, evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract where such meaning is doubtful, but not where the meaning is plain: nor is it admissible to enlarge or vary the terms of the contract. To admit it in the latter case would be to contravene the provisions of Section 92 of the Indian Evidence Act, 1872: Haji Mahomed Haji Jiva v. E. Spinner ILR (1901) 24 Bom. 510; Ford v. Yates (1841) 2 Man. & Gr. 549; and Bourne v. Gatliff (1844) 11 C. & F. 45. In Ford v. Yates (1841) 2 Man. & Gr. 549 there was a written contract for the sale of hops. The contract did not specify any time for payment or delivery. Such a contract imports by construction of law a sale for ready money. Evidence was tendered to show on behalf of the buyers that by the usual course of dealings between the parties, the price was not payable until after six months from the date of sale, but it was held that the evidence was inadmissible. This case is an authority for the proposition that incidents which are impliedly contained in a written contract, whether by construction of the terms or by implication of law. cannot be varied by extrinsic evidence: Leake on Contract, 6th Edition, p. 122. In the present case the plaintiff''s sought to rely on the previous course of dealings to show that though the contract was on c.i.f. terms, the defendants were not entitled either to a bill of lading or to a policy of insurance, and that they were bound to pay against the delivery telegram. This would be to vary the incidents of a c.i.f. contract, and the evidence would, therefore, be inadmissible u/s 92. But though the plaintiffs were not allowed to lead this evidence, their counsel brought out in the cross-examination of the defendant what the course of dealings between the parties was. The defendant said

that on previous occasions he paid the price against delivery telegrams, but he added that he did not pay until after he had examined the goods. Even, if, therefore, the evidence was admissible, it would not help the plaintiffs. I, therefore, hold that the defendants were not bound to pay against the delivery telegram.

12. But it was contended for the plaintiffs that the defendants did not at any time object to pay on that ground, that the only ground on which they refused to pay was that the goods were of inferior quality, and that they could not be allowed at the hearing of th6 suit to raise that objection. I do not think there is any substance in this contention. A buyer who rejects goods on a wrong ground is not thereby precluded from relying on a valid ground which in fact exists, Thus a buyer who refuses to accept further deliveries on the ground that his sub-purchaser would not take them owing to previous commitments is not precluded from proving at the trial of the action that the goods were not of the contract description : Taylor v. Oakes, Roncoroni and Co. (1922) 38 T.L.R. 349.

13. It was also urged on behalf of the plaintiffs that the defendants repudiated the contract by their letter of December 13, or, in any event, by their letter of December 19, and that the plaintiffs were therefore absolved from proving that they were ready and willing to perform their part of the contract. I do not think that either of these two letters amounts to a repudiation of the contract. Atkin L.J., in Consorzio Veneziano v. Northumberland Shipbuilding Co. (1919) 88 L.J.K.B. 1194 said:

A repudiation has been defined in different terms, by Lord Selborne as an absolute refusal to perform a contract, by Lord Esher as u total refusal to perform, by Bowen L.J. as a declaration of an intention not to carry out the contract when the time arrives, by lord Haldane as an intention to treat the obligation as altogether at an end. All these definitions come to the same thing, and make it clear that to constitute a repudiation, one of the parties to the contract must make quite plain his intention not to perform the contract.

14. To the same effect are the provisions of Section 39 of the Indian Contract Act. That section provides that "when a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance." The defendants did not by their letter of December 13 refuse to perform the contract in its entirety. They only asked for a survey to enable them to take Immediate delivery, Nor did the letter of December 19 amount to a total repudiation of the contract. But even if it did, the repudiation was after the broach of the contract on the part of the plaintiffs. The plaintiffs ought to have tendered a bill of lading and a policy of insurance long before December 19 and failure to do so amounted to a breach of the contract on their part. Moreover, if their was a repudiation, the plaintiffs did not accept it as a breach of the contract until December 20 when they threatened to sell the goods. I, therefore, hold that the plaintiffs were not absolved from tendering the proper documents. It does not

make any difference that payment was to be made before delivery. In either case they must show that they wore ready and willing to perform their part of the contract. This it was impossible for them to do as they had neither a bill of lading nor a policy of insurance.

15. There is yet another ground on which the defendants rely. They pay that though the plaintiffs received the survey report on December 7 or 8, it was not shown to them until after the institution of this suit, and that they were not bound to pay unless it was shown to them, I think there is considerable force in this contention. The contract being on c.i.f. terms, the buyers were bound to pay against the documents even before the arrival of the goods, and the report was a sort of guarantee that the goods shipped were contract goods. The report was to be considered as final until the arrival of the goods, After their arrival it was open to the buyers to make their objection as to the quality of the goods provided the objection was raised within twenty-four hours after they were landed. The plaintiff''s alleged that they showed the report to the defendants on December 15 or 16, and they called their manager Chunilul to prove it. Chunilal said in his evidence that on December 15 or 16 some one on behalf of the defendants came to inquire about the goods, when he showed him the survey certificate. He was asked in cross examination why it was that this interview was not referred to anywhere in the correspondence, to which his only answer was, "Because I took it that the defendants would make the payment." The defendant denied in his evidence that he sent any man to the plaintiff office on December 15 or 16. I do not believe Chunilal, and I accept the defendant''s evidence. I hold that the survey report was not shown to the defendants before the suit was tiled. Chunilal admitted that the defendants were entitled to see it before they made the payment. As it was not shown to the defendants, they were not bound to pay for the goods.
16. I dismiss the plaintiffs'' suit with costs.