(1924) 08 BOM CK 0032

Bombay High Court

Case No: Second Appeal No. 47 of 1923

Balvant Vishnu		APPELLANT
	Vs	
Mishrilal Shivnarayan		RESPONDENT

Date of Decision: Aug. 7, 1924

Acts Referred:

- Contract Act, 1872 - Section 30

Citation: AIR 1925 Bom 115 : (1924) 26 BOMLR 1194 : 85 Ind. Cas. 177

Hon'ble Judges: Lallubhai Shah, J; Fawcett, J

Bench: Division Bench

Judgement

Lallubhai Shah, Ag. C.J.

1. This appeal aries out of a suit brought by the plaintiff to recover damages for a breach of the contract entered into by the defendants'' father, now deceased, with the plaintiff to purchase twenty Khandies of cotton. The contract was entered into on December 9, 1916, and was in these terms:--

To Shivnarayan Hajarimal Marwadi, residence Bhusaval, be pleased to road the salutations of Balvant Vishnu Nargundkar, residence Bhusaval. The object of writing this letter is that a contract is made between you and me for cotton, approximately 20 Khandies of large Malkapur measure, that is of 392 seers, at Rs. 150 for every Khandy. This contract was made approximately five or six days ago. You can take delivery of the said cotton goods on January 1, 1917, or any time before, by coming here, that is, by coming to our field in village Charthane, I will take the price of the goods immediately after the weighment and delivery of the cotton and on the same day. I have taken to-day for earnest two pairs of silver todas, both together 225 rupees in weight. Their price will be computed according to the market rate of today. If under the above contract you do not take delivery I will recover from you loss in accordance with the price at the time in Malkapur Peth, If the price be above Rs. 150 then I will give you the profit.

2. The plea of the legal representatives of Shivnarayan was that this was really a wagering transaction. The trial Court accepted that defence, principally on the ground that the last clause in the contract that "if the price be above Rs. 150, then I will give you the profit" was to be read as affording a key to the whole contract, and that the other terms were to be treated as a sort of disguise to conceal the real meaning of the parties, namely, that it was a sort of stake on the question whether the rate of the cotton on a particular date would be over or below Rs. 150. It is one of the defects in the judgment of the trial Court, to my mind, that though the learned Judge was satisfied that at least the plaintiff intended to carry out the first part of the agreement by giving actual delivery, if the defendant had only chosen to claim it, still he came to the conclusion that it was a wagering transaction. No doubt the learned Judge says that the common intention of both parties was to deal in differences only. He also found that the net damages amounted to Rs. 162 making due allowance for the price of the ornaments which are referred to in the contract He held that on the due date of the delivery Rs. 130 was the rate per Khandy and calculated the damages on that footing; but he dismissed the suit with costs.

3. The plaintiff appealed to the District Court, and the learned Assistant Judge who heard the appeal found on the first issue that the contract was of ft wagering nature, and in that view he did not consider it necessary to deal with the question of damages any further.

4. The plaintiff has appealed to this Court, and the principal question in the case is whether the contract is in the nature of a wager There is not much of evidence in the case and I may observe that the decisions of the lower Courts are principally based upon the terms of the contract. It is largely a question of construing the contract. I am unable to accept the view taken by the lower Courts. The contract is for a sale of twenty Khandies of cotton which, there is no dispute in the case, the plaintiff was in a position to give delivery of, if the delivery was demanded, and if the defendant was ready to take delivery on the due date. Then there is the fact that certain silver todas were given as earnest for the fulfilment of this contract by the defendant. The last two clauses in the contract are the important clauses, which have induced the lower Courts to come to the conclusion that this must be treated as a wagering transaction. It is provided that "if under the above contract you do not take delivery I will recover from you loss in accordance with the price at the time in Malkapur Peth." So far it is nothing more than a statement of the consequence of a breach on the part of the defendant. It does not, to my mind, in any sense indicate that the intention was not to give or to take delivery. If the defendant failed to take delivery, which he might in any case even if the contract was a legal transaction, then he was to make up for the loss resulting from his not taking delivery.

5. The clause that if the price be above Rs. 150 then the plaintiff was to give the defendant profit appears to have caused a difficulty in the case. It seems to me that it is only a continuation of the statement of the consequences of a breach on either

side. If the rate was below the contract rate at the due date, then the defendant would have to pay the loss if he did not take delivery, and if the rate at the due date be above Rs. 150, then the plaintiff would have to pay the difference in case he failed to give delivery. No doubt the words "If I fail to give delivery" are not to be found in this clause. If they had been used, the matter would have been beyond the range of controversy. But taking this to be a contract between two ordinary parties, I am unable to read this clause in any other sense, and the meaning which I put upon it, and which in my opinion it naturally bears, is one which I have just indicated, namely, that if the plaintiff failed to give delivery and the price at the due date was above Rs. 150, then he was to give the profit to the defendant.

6. It appears that in the cross-examination the defendant''s pleader put this matter to the plaintiff and he answered as follows:--" I was to pay the differences only if I refused to make delivery and the price was against me." It seems to me that the parties in this case have unnecessarily proceeded to provide for the consequences of a breach, namely, that if the market price on the due date went against the purchaser, and if he failed to take delivery, as he might well fail to do on that account, then he was to pay the loss, and if the market went against the vendor, and if he failed to give delivery, then he was to pay the loss. That seems to me to be the true and natural meaning of this contract. If this contract is to be read with a view to give effect to it as far as possible and not with a view to invalidate it, it seems to me that the contract lends itself easily to that interpretation: and that is the view which I take of this contract. It is not necessary to say more on the subject, nor is it necessary to refer to the cases.

7. In any case, it seems to me that the proof falls far short of what would be necessary to indicate the common intention on the part of both parties to deal in differences only from the beginning. That indication is lacking in the present case. I find it extremely difficult to accept the view taken by the lower Courts. The case of In re Gieve [1899] 1 Q.B. 794. which has been much relied upon, particularly by the trial Court, was quite a different case. The terms of the contract there were clearly indicative of the fact that no delivery was intended to be given or taken, and if by chance the buyer in that case wanted delivery, then he was to give certain extra price. I do not consider it necessary to set forth the note of contract in that case: but it is enough to point out that that was quite a different case from the present one. In the present case the contract begins with the express intention to give and take delivery, and that in the event of the defendant not taking delivery, he was to pay the loss. As a matter of fact the occasion for applying the clause, upon which so much reliance is placed by the lower Courts on the facts of this case, has not arisen. The price did not go above Rs. 150, nor do I see any indication in the case that the price fixed under the contract was so far above the normal ruling rate at the date of the contract so as to afford some basis for the view that it was a sort of stake upon the ruling rate being Rs. 150 at the due date. The market rate on the due date is found by the lower Court to be Rs. 130, and the fluctuations within certain limits

must be taken to be within the contemplation of parties as ordinary incidents of such contracts, and cannot be taken as indicative of any desire to fix up an abnormally high rate with a view to gamble on the possibility of that rate being the ruling rate on the due date.

8. I am, therefore, of opinion that this contract was not a wagering transaction, but a legal contract, and as admittedly the deceased Shivnarayan failed to carry out the terms of the contract, his heirs are liable in damages.

9. As regards the amount of damages, though the lower appellate Court has not recorded any finding, it is conceded before us that the finding of the trial Court on this point must be accepted. The plaintiff claimed damages on the footing of the difference between the contract price and the price realized by the sale of this cotton long after the due date for the performance of the contract. He is clearly not entitled to damages on this footing. There is nothing to show that the defendant ever extended the time for the fulfilment of this contract. Therefore the only basis upon which the plaintiff could claim damages would be the basis of the difference between the contract price and the market price of the goods on the due date. That has been determined by the trial Court, and we accept that finding. I would allow this appeal, reverse the decree of the lower appellate Court, and pass a decree in favour of the plaintiff for Rs. 162. The plaintiff to have his costs throughout on the amount decreed.

Fawcett, J.

10. The defendant set up a plea that the contract sued upon is a wagering one falling u/s 30 of the Indian Contract Act. The onus of establishing that plea rests upon him. There must be a common intention, not only on the part of the defendant''s father, who entered into the contract, but also on the part of the plaintiff, not to give delivery, but merely to pay differences according as the market price fell or rose above the figure of Rs. 150, So far as the defendant''s father was concerned, the lower Court gave reasons for thinking that his intention was not to do any real business in cotton, the subject matter of the contract, but merely to speculate on the rise and fall of the market But the lower Court was more favourable in regard to the plaintiff''s intention, and after considering all the circumstances felt satisfied that he at least intended to carry out his part of the agreement by giving actual delivery, if the defendant had only chosen to claim it. The only thing that goes against the plaintiff is the last clause in the agreement that "if the price be above Rs. 150, then I will give you the profit." The two lower Courts have held that that plainly shows that the real agreement between the parties was not a commercial transaction, but a wager on the rise and fall of the market. But, in view of the circumstances favourable to the plaintiff that I have already alluded to, before the plaintiff is convicted of an intention to wager, it must be conclusively established that that is the proper interpretation of the contract, because only on this particular construction can this common intention be held proved. I admit that

the view taken by the lower Courts is one that naturally arises from the way in which this particular sentence follows upon a sentence contemplating the defendant not taking delivery, And if the contract alone is looked at, it seems quite natural to say that the words "if the price be above Rs. 150 then I will give you the profit" still contemplate the contingency of the defendant not taking delivery. But, on the other hand, that is not a necessary construction, and I think it is at any rate a possible construction to say that the parties were contemplating the other position, namely, the possibility of the plaintiff not giving delivery and the price not rising above Rs. 150. In a case of this kind where the plaintiff''s conduct is shown to be otherwise unexceptional, I think the Court should lean towards a construction favouring the validity of the contract rather than its illegality. I think we are entitled to give the plaintiff the benefit of this favourable construction, although apparently it was a construction that was not urged on his behalf before the two lower Courts. I agree, therefore, in the order proposed by my learned brother.