APPELLATE CIVIL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Fforde.

1923

Feb. 28.

BUBBY HURRY & Co. (DEFENDANTS) Appellants,

versus

M. HERTZ & Co. LIMITED (PLAINTIFFS) Respondents.

Civil Appeal No. 1559 of 1918.

C. I. F. contracts—Duties and rights of vendor and buyer under such contracts explained—right of vendor to resell the goods—Indian Contract Act, IX of 1872, section 107.

Held, that when goods have been sold upon C. I. F. terms the contract of the seller is performed by tendering to the buyer the documents which would enable the latter to obtain on the ship's arrival the delivery of the goods contracted for. If the contract of sale provides that payment is to be made by draft drawn on the buyer, the latter is bound to accept the draft upon tender of the proper documents. This he must do even though the goods be lost or destroyed at the time the draft is presented.

The delivery he is entitled to as against payment of the contract price is not of the goods contracted for, but of their symbol, represented usually by the bill of lading, charter-party, invoice and policy of insurance. Upon payment he can, upon arrival of the ship, demand the goods themselves and should these not be forthcoming, or when forthcoming, not be of the nature contracted for, all his remedies at law are then open to him.

Clemens Horst Company v. Biddell Brothers (1), followed

Stirling Mason and Company v. *Jawala Nath-Bhagwan Das* (2), referred to and discussed.

Held also, that if the buyer refuses to take delivery of the goods the right of re-sale, if not expressly agreed upon, is conferred upon the vendor by section 107 of the Indian Contract Act, IX of 1872 (corresponding to section 48 (3) of the English Sale of Goods Act, 1893).

First appeal from the decree of Sheikh *Rukn-ud-Din, Subordinate Judge, 1st Class, Amritsar, dated the 30th April* 1918, *decreeing the claim.*

SARDHA RAM and JAGAN NATH, for Appellants.

MORTON, for Respondents.

(1) (1912) Ap. Cases 18. (2) (1920) I. L. R. 1 Lah. 22.

1923

BUBBY HURRY AND CO. v. M. HERTZ & CO. LIMITED.

The judgment of the Court was delivered by—

FFORDE J.—This is an appeal of the defendants against the judgment of the Subordinate Judge of Amritsar in an action brought to recover damages for breach of contract arising out of an agreement, or agreements, for the sale of certain goods. The facts are fully set out in the judgment of the Court below and we will only re-state them so far as is necessary for the purpose of making our reasoning clear.

On the 23rd of December 1909, the defendant-appellants entered into a contract in writing with the plaintiff-respondents, whereby the former agreed to buy and the latter to sell certain goods upon the terms and conditions therein contained. This document contains 23 clauses and concludes with a statement that the parties shall "accept the above contract as the basis of the agreement between them."

Clause 2 of the document provides that the vendor shall draw upon the purchasers through any bank in sterling for the total amount of the invoice at 60 days' sight, free of interest, the bills of lading and shipping documents to be handed to the purchasers on payment of the draft. The purchasers further bind themselves to accept such drafts upon presentation and pay at maturity, notwithstanding any objection that they have on account of any variation whatever from the terms of the indent, such objections, if any, to be settled privately or by arbitration.

Clause 8 contains the provision as to arbitration and commences with the statement that the purchasers shall not raise any claim in respect of the transaction unless they have accepted and retired the draft or drafts.

The goods are to be shipped on purchasers' account and risk and all offers and prices are deemed to mean "Free Karachi Harbour."

On the 31st December 1912, the appellants wrote to the respondents three letters, the first ordering 20 cases of prints, the second 5 bales of *khaki* and the third 5 cases of white mulls, upon certain terms which need not be fully referred to.

1928

BUBBY HURRY AND CO. v. M. HERTZ & CO. LIMITED.

The first two letters expressed terms to be C. I. F. Karachi Harbour, and all three opened with the phrase "please supply the following goods on our usual terms and conditions."

The respondents contend that the words "our usual terms and conditions" mean the terms and conditions contained in the agreement of the 23rd December whereas the appellants' contention is that these words refer to the course of business actually transacted between themselves and the respondents and have no reference to the document of the 23rd December which applied only to a specific transaction of that date. The appellants further contend that even if that document does in fact govern the contracts in dispute it does not bear the construction placed upon it by the respondents.

The contest between the parties is mainly concerned with clauses 2 and 8 referred to above.

The respondents claim that under those clauses they are entitled to payment for goods supplied to the order of the defendants upon tender of the shipping documents and that no question as to quality or condition of the goods can be raised by the purchasers until payment has been effected by the retirement of the drafts. The appellants, on the other hand, maintain that even if these clauses govern the contracts of sale they are entitled to reject goods which are not up to sample or of the nature ordered, without retiring the drafts. They also contend that under the arbitration clause they are entitled to refer to arbitration any dispute which may arise as to the nature or quality of goods shipped to their order, before any payment need be made. The respondents deny that arbitration can be invoked until the drafts have been retired.

So far as the agreement of the 23rd December is concerned we have no doubt at all that upon the true construction of that agreement the purchasers are bound to accept the drafts upon presentation on tender of the bills of lading and shipping documents; and that no claim by the purchasers can be raised, nor arbitration invoked, until such payment has been made.

1923

BUBBY HURBY AND CO. v. M. HERTZ & CO. LIMITED.

The further question then arises as to whether or not this document governed the transaction in question. This question would have been material but for the fact that the transactions in dispute are expressed to have been, and obviously were, upon the usual "cost, freight and insurance" contract—a form of mercantile dealing the principles and legal effects of which have been so exhaustively defined by judicial decisions that no room is left for any doubt or ambiguity whenever that form of contract has been adopted.

That it has been adopted in the cases before us is clear beyond question, even if we leave the document of the 23rd December out of consideration. Not only did the letters of the appellants ordering the goods expressly state the terms to be C. I. F., but if any further assurance were required on this point it is provided by the bills of lading themselves, which bear on their face the following terms :—

"C. I. F. Karachi Harbour draft 30 days sight.

"Through the Chartered Bank of India, Australia and China.

"Documents against payment.

"Insured for £75."

No clearer evidence of a C. I. F. contract could be found.

The appellants, indeed, admit that the contract was a C. I. F. one, but still contend that this does not take away their right as purchasers of specific goods to reject those goods on arrival at the port of destination if they are not up to sample. They maintain that the rights of examination and rejection before payment are implied in C. I. F. as in other contracts for the sale of goods. In support of this contention counsel for the appellants has referred us to the decision of the Court of Appeal in the well-known case of *Biddell Brothers v. E. Clemens Horst Company* (1). It was there held by Vaughan Williams L. J. and Farwell L. J. (Kennedy L. J. dissenting) that on a C. I. F. contract "terms not cash" the buyers were not bound to pay for certain hops on tender of the shipping docu-

(1) (1911) 1 K. B. 934.

1923

BUBBY HURBY AND CO. v. M. HERTZ & CO. LIMITED.

ments but were entitled to refuse payment, until upon the arrival of the hops they had been given an opportunity for inspection of them.

Apart from the fact that the contract in that case materially differed from the one before us in that it contained no term expressly providing for payment against shipping documents—an omission which went to the root of the decision of Farwell L. J.—the decision of the Court of Appeal was unanimously reversed by the House of Lords on appeal [*E. Clemens Horst Company* v. *Biddell Brothers* (1)] and the dissenting judgment of Kennedy L. J. adopted with very strong expression of approval. The effect of that and a number of subsequent decisions is to make it clear beyond all possibility of doubt that when goods have been sold upon C. I. F. terms the contract of the seller is performed by tendering to the buyer the documents which would enable the latter to obtain on the ship's arrival the delivery of the goods contracted for. These documents must, of course, be tendered within a reasonable time from the date agreed upon for shipment of the goods which they represent. If the contract of sale provides, as it does in the present case, that payment is to be made by draft drawn on the buyer, the latter is bound to accept the draft upon tender of the proper documents. This he must do even though the goods be lost or destroyed at the time the draft is presented. The delivery he is entitled to as against payment of the contract price is not of the goods contracted for but of their symbol represented usually by the bill of lading, charter party, invoice and policy of insurance. Upon payment he can, upon arrival of the ship, demand the goods themselves and should these not be forthcoming, or, when forthcoming, not be of the nature contracted for, all his remedies at law are then open to him.

In *Stirling Mason and Company v. Jawala Nath-Bhagwan Das* (2) a Division Bench of this Court held that buyers of goods who had accepted a draft upon presentation of shipping documents could not refuse to honour the draft on the ground that there was a failure of consideration by reason of the goods not being in accordance with the description as entered in the indents.

(1) (1912) A. C. 18. (2) (1920) I. L. R. 1 Lah. 22.

1923

BUBBY HURRY AND CO. v. M. HERTZ & CO. LIMITED.

This decision is in accordance with the views we have expressed, but we find ourselves nevertheless unable to agree with the principle upon which that decision is based as expressed in the judgment in that case, *viz* :—

"That the plaintiffs cannot in answer to the claim upon the draft plead failure of consideration because what they contracted for were the shipping documents and not the actual goods."

The learned Judges in formulating this view of the principle underlying this class of contract accepted the opinion expressed by Scrutton J. in *Arnold Karberg and Co.* v. *Blythe, Green, Jourdain and Company, etc.* (1) namely,—

"that a C. I. F. sale is not a sale of goods, but a sale of documents relating to goods."

The attention of the learned Judges, unfortunately, was apparently not directed to the fact that in that case an appeal was brought, and Bankes L. J. and Warrington L. J., in the Court of Appeal, expressly disapproved of this opinion of Scrutton J. (2)

Bankes L. J. expressed himself as follows :—

"Scratton J. in his judgment has used one expression with which I do not agree. The expression is the one in which he says that the key to many of the difficulties arising in C. I. F. contracts is to keep firmly in mind the cardinal distinction that a C. I. F. sale is not a sale of goods, but a sale of documents relating to goods. I am not able to agree with that view of the contract, that it is a sale of documents relating to goods. I prefer to look upon it as a contract for the sale of goods to be performed by the delivery of documents, and what those documents are must depend upon the terms of the contract itself."

Warrington L. J. adopted the following opinion of Hamilton J. expressed in his judgment in *Biddell Brothers v. E. Clemens Horst Company* (3)—

"A seller under a contract of sale containing such terms—that is, a C. I. F. contract—has firstly to ship at the port of shipment goods of the description contained in the contract; secondly, to procure 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

(1) (1915) 2 K. B. D. 379, 388. (2) (1916) 1 K. B. 495, 510.
(3) (1911) 1 K. B. 934.

current in the trade which will be available for the benefit of the buyer; fourthly, to make out an invoice as described by Blackburn J. in *Ireland* v. *Livingston* (1) 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 on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on boardship at the port of shipment. It follows that against tender of these documents the bill of lading, invoice, and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price."

The learned Lord Justice then goes on to say:—

"Incidentally I desire to say that I entirely agree with Bankes L. J. in the remarks he has made about the statement made by Scrutton J., that such a contract as this is a contract for the sale of documents. I need not say that it is with much deference that I express my disagreement with a statement of that sort made by a Judge with such extensive knowledge of commercial matters as Scrutton J., but it seems to me that it is not in accordance with the facts relating to these contracts. The contracts are contracts for the sale and purchase of goods, but they are contracts which may be performed in the particular manner indicated by that passage from the judgment of Hamilton J. which I have just read; in particular that the delivery of the goods may be effected first by placing them on board ship, and, secondly, by transferring to the purchaser the shipping documents."

It is obvious, therefore, that the respondents in the present case might have refused payment if the shipping documents tendered to them were not such as they were entitled to receive under their contract—that is to say, documents which would entitle them to receive delivery of the goods themselves, or their value under the policy of insurance if the goods were lost, but they were not entitled to raise any question as regards the goods themselves until they had retired the drafts.

So far, therefore, as this part of this case is concerned it is clear that the appellants' contentions are unsustainable. The shipping documents to which they were entitled, and the drafts, were duly tendered to them and they refused to pay, and they have accordingly failed to perform their part of the contract. The respondents, treating their refusal—as they were quite

(1) (1872) L. R. 5 H. L. 395, 406.

1923

BUBBY HURRY AND CO. v. M. HERTZ & CO. LIMITED.

justified in doing—as a breach of the contract, then proceeded to sell the goods by private treaty, after having given to the appellants due notice of their intention to do so; and the only matter which remains to be considered is whether or not the respondents had, under the circumstances, a right of re-sale, and, if so, whether that right was properly exercised.

That they had the right to re-sell the goods cannot be seriously disputed. If the parties were bound by the terms of the agreement of the 23rd December the right of re-sale is governed by clause 3 of that document, which provides that upon failure by the appellants to accept the draft on presentation or pay at maturity, the respondents may sell the goods by public auction or private sale after giving ten days' notice of intention to do so, the appellants undertaking to make good any deficiency or loss sustained and waiving any profit on such sale should there be any.

If the appellants' contention that they are not bound by this agreement be accepted the right of re-sale is conferred upon respondents by section 107 of the Indian Contract Act (corresponding to section 48 (3) of the English Sale of Goods Act, 1893), which is in all material respects identical in effect with clause 3 of the agreement. Indeed this clause was obviously based upon section 107 of the Statute. The only difference between respondents' right to re-sell under the statute and their right under the agreement is that in the former case it could only be exercised if the property in the goods had passed to the appellants at the time of the breach of contract, while in the latter case it could be exercised irrespective of whether such property had or had not passed. The distinction in the present case is not material as the property, undoubtedly, passed to the appellants at the latest at the moment of tender of the shipping documents.

The only question, therefore, left for our decision is, whether the sale was a proper one or not. Upon the answer to that question depends the respondents' right to the amount of damages claimed in the present action, namely, the difference between the contract price and the price realised by the sale. As to this,

1923

BUBBY HURRY AND CO. v. M. HERTZ & CO. LIMITED.

the appellants say that the sale was collusive and fictitious and at an under-value.

It is true that the manner in which the transaction was carried out was not all that it ought to have been. A person of more than doubtful reputation in commercial matters was selected as commission agent to negotiate the sale, and a good deal of mystery surrounds the identity of the actual purchasers; and moreover the evidence as to the market-value of the goods at the time of sale is lamentably deficient. But the fact remains that the price actually obtained was higher than an offer made by the appellants themselves. They had ample opportunity to investigate the validity of the transaction at the time and neglected or failed to do so. They have not produced any satisfactory evidence to show that the price realized was an under-value. This question was closely inquired into at the trial, and the Court below has held that the goods realized a proper price and that there was nothing collusive or improper in the manner in which the sale was effected.

Although we may not entirely agree with the learned Subordinate Judge on this particular finding yet we cannot, on the evidence before us, hold that he was not reasonably entitled to find as he did.

For the reasons we have given we have no alternative but to dismiss the appeal, the parties to pay their own costs in this Court.

A. R.

Appeal dismissed.