

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1933

July 11.

G. KYI MAUNG

v.

MORRISON & CO.*

Contract for rice—Service of milling notice, effect of—“ Intend to commence milling ”, whether means liberly to resile from contract—Refusal to accept milling notice—Repudiation of contract—Seller's election—Deposit of margin, conditions for.

By three contracts made in March and April 1932 the appellant bought from the respondents a certain quantity of rice. Delivery was to be taken ex-hopper during July 1932 date at seller's option, and the price was to be paid not later than immediately after milling and before any rice was removed. If the market price of the rice declined prior to milling the sellers had the right to require the buyer to deposit with the scellers prior to the milling the margin between the contract price and the market price of the day on which such milling notice was issued for the rice deliverable under the contract. Failing the deposit the sellers had the right to cancel the contract and to claim damages.

The respondents duly issued milling notices to the appellant which the appellant refused to accept on the ground that by substituting in the notices the words “ *we intend to commence milling* ” for “ *we shall commence milling* ” the sellers could claim to resile from them at will. The respondents again tendered milling notices to the appellant in respect of the first contract, and as the market price of the rice had fallen the respondents required the appellant to deposit with them the margin as stipulated in each of the contracts. The appellant again refused to accept the notices, and failed to deposit the margin. The respondents thereupon cancelled the contracts, and sued the appellant for damages.

Held, that (1) by serving the milling notices on the appellant the respondents duly exercised the option given to them to fix the dates and mills for delivery of the rice, and that the parties were bound respectively to give and take delivery on the dates and at the mills therein named ; (2) the appellant's refusal to accept the milling notices amounted to a repudiation of the contracts and the respondents could have treated the contracts as at an end, but that they had not elected to do so ; (3) the contracts not having been cancelled and the market price having fallen the respondents were entitled to demand the margin ; (4) the margin that the sellers could require to be deposited was the margin for the whole quantity of the rice deliverable under the contract, and not merely a proportionate amount in respect of the rice to be milled under each milling notice in case more than one milling notices were issued, and the deposit had to be made prior to the time fixed for the commencement of milling by the

* Civil First Appeal No. 64 of 1933 from the judgment of this Court on the Original Side in Civil Regular No. 482 of 1932.

earliest notice, and not by the latest of such milling notices; (5) on the failure of the buyer to deposit the margin the respondents were justified in cancelling the contracts, and claiming damages.

Jureidmi v. National British Insurance Company (1915) A.C. 499; *Steel Bros. & Co. v. Tokersee Mooljee*, I.L.R. 10 Ran. 372—*followed*.

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Rafi (with him *Kyaw Myint*) for the appellant. After the decision in *Steel Bros. & Co., Ltd. v. Tokersee Mooljee* (1) rice millers in Rangoon have substituted in their milling notices the words "intend to deliver" in place of "shall deliver". The purpose of the alteration is obvious. The use of the word "intend" shows that there is no definiteness about it. The millers may or may not make delivery on the date specified in the milling notice. The mere sending of a milling notice does not determine the option given to the seller under the contract to fix a date for delivery. The language used has to be considered.

There are two stages in the law of election—one the intention stage and the other the determination stage. The respondents in the present case were only in the intention stage, and the question whether they were ready and willing to deliver on the dates mentioned in the milling notices does not arise.

N. M. Cowasjee for the respondents. The appellants refused to accept the milling notices that were tendered to them, and the respondents therefore were entitled to infer from the conduct of the appellants that they did not intend to fulfil the contract. On the other hand the respondents gave the buyers another chance of carrying out the contract by re-tendering the milling notices, and also demanding the deposit of the margin prior to milling in accordance with clause 9 of the agreement. On the failure of the appellants to comply with the terms of the contracts respondents

(1) I.L.R. 10 Ran. 372.

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cancelled the contracts reserving their right to recover damages for failure to take delivery on the due dates.

PAGE, C.J.—The suit out of which this appeal arises was brought to recover damages for failure to take delivery of 23,000 bags of rice which the appellant bought from the respondents. The contracts are contained in three bought notes dated respectively the 17th March, 1932, the 23rd March, 1932, and the 22nd April, 1932. The bought notes are in the common form used by rice millers at Rangoon. Clauses 8 and 9 of the contracts are in the following terms :

" 8. Delivery to be taken ex-hopper during July, 1932, the usual Kanaungtoe Mills only, as approved by B.R.M.A., date at sellers' option and payment to be made in cash before any rice is removed, but not in any case later than immediately after milling. Payment in cash on completion of the milling of each 1,000 bags if required.

9. If the market price of the abovementioned rice declines prior to milling sellers shall have the right of requiring buyer/buyers to deposit with sellers the margin between contract price and market price of the day on which such milling notice is issued for the rice deliverable under this contract. Failing the deposit of such margin as stated prior to time fixed for commencement of milling sellers shall have the right of cancelling this contract and of claiming on buyer/buyers for any difference between sale price and market price of the day on which milling notice is issued for rice deliverable under this contract."

Certain letters between the parties were admitted by consent at the trial, but no evidence was adduced by the respondents and only one witness was called by the appellant, as it was common ground that the only two issues in dispute were (i) whether by serving upon the appellant certain milling notices the respondents fixed the date and place for delivery of the rice under clause 8 of the contracts ; and (ii) whether the appellant was released from liability for failing to take

delivery by reason of the cancellation of the contracts by the respondents under clause 9 thereof.

As regards (i), in my opinion the case is covered by *Steel Bros. & Co., Ltd. v. Tokersee Mooljee* (1). The milling notices issued in the present case were all in common form, and milling notice No. 416, which may be taken as an example, ran as follows :

"No. 416. Steel Bros. & Co., Ltd., Rangoon, 21st July, 1932. Milling Notice. Messrs. Morrison & Co. Sale Note No. 405. Dear Sirs, This is to give you notice that we intend to commence milling for you at Ellerman's Kanoungtoe Mill on the 22nd instant at 3 p.m. against above sale 1,000 bags K'toe S.M.S. July. Please arrange that gunnies and twine are at our Mill in good time, and that you have a representative there to pass the rice during milling. If Gummies are not sent to our Mill we will charge 75 per cent. This notice must be presented at our Mill by the person appointed by you to pass the rice."

In *Tokersee Mooljee's* case the Court construed forms of contract and milling notice similar to those in the present case, and the interpretation that the Court put upon these documents in that case need not be repeated.

It is contended on behalf of the appellant that because the words "intend to" and not "shall" occur in the milling notices the sellers were at liberty, after serving the notices, to resile from them at will. To dispose of this contention it is enough to say that we are satisfied that by serving these milling notices on the appellant the respondents duly exercised the option given to them under clause 8 of the contracts to fix the dates and mills for delivery of the rice, and that the parties to the contracts were bound respectively to give and take delivery on the dates and at the mills therein named. It was not disputed at the trial that the appellant refused and failed to take delivery

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of the rice pursuant to the milling notices, or that the respondents were ready and willing to give due delivery thereof under the contracts. Indeed, in the circumstances hereafter appearing it must be taken that the appellant waived all conditions precedent to be performed by the respondents; *Jureidini v. National British Insurance Company* (1). *Primâ facie*, therefore, the respondents were entitled to recover damages from the appellant for failing to take delivery of the rice.

Now, it is common ground that between the dates of the several contracts and the dates when the milling notices were issued respectively the market price of the rice had fallen, and that the appellant refused to accept any of the milling notices and returned them to the respondents. I am of opinion in the circumstances obtaining in the present case that the respondents would have been entitled to regard the appellant's action in refusing to accept the milling notices and returning them to the respondents as an intimation that the appellant did not intend to perform his obligations under the contracts. The appellant did not withdraw his repudiation of the contracts before the due dates for delivery under the contracts or any of them, and, in my opinion, on receiving notice of the appellant's repudiation of the contracts the respondents would have been entitled to treat these contracts as at an end, except for the purpose of bringing a suit to recover damages for breach of contract. The respondents, however, did not accept the appellant's repudiation of the contracts, or elect to treat the contracts as at an end, and in respect of the contract of the 17th of March, 1932, the respondents again tendered the milling notices to the appellant, and in

(1) (1915) A.C. 499.

respect of all three contracts required the appellant to deposit with them the margin between the contract price of the rice deliverable under the contracts and the market price on the respective dates when the milling notices were issued. The appellant, however, refused to accept the milling notices when re-tendered to him, and failed to deposit the margin required on the dates named by the respondents, or at any time prior to the time fixed for the commencement of milling under the contracts.

The respondents, purporting to act under clause 9, thereafter cancelled the contracts. In my opinion the respondents were justified in so doing. As I construe clause 9 of the contracts under consideration, where a buyer is required under that clause to deposit a margin with the seller he is under an obligation to deposit the margin in respect of the whole quantity of rice deliverable under the contract prior to the time fixed for commencement of milling under the milling notice or, if more than one is issued on the same day, under the earliest of the milling notices issued in that behalf, and is not entitled to deposit the proportion of the margin required in respect of the rice to be milled under each milling notice prior to the time fixed for the commencement of milling the rice to which the particular notice refers; or where more milling notices than one have been issued to refrain from making the deposit of the margin in whole or in part until the time fixed for commencing milling by the latest of such milling notices.

It is to be observed that in clause 9 the words used are not "on which each milling notice is issued for the rice deliverable under such notice", but "on which such milling notice is issued for the rice deliverable under the contract"; that is to say, the seller is entitled to require the deposit of the margin

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for the whole of the rice deliverable under the contract before the time that has been fixed for commencing the milling of the rice under the contract. In the present case, on the 21st July, 1932, the date upon which the milling notices in respect of the contract of the 17th March, 1932, were issued, the respondent by a letter from their advocates of even date required the appellant to deposit Rs. 27,750, representing the margin between the contract price and the market price on that date of the rice deliverable under that contract. In my opinion the appellant was bound under clause 9 to deposit this margin before 3 p.m. on the 22nd July, that is, "prior to the time fixed for the commencement of milling" the rice deliverable under that contract. It is true that in the letter of the 21st July, 1932, the respondents "also" stated that in the event of the appellant failing to pay to the respondents Rs. 27,750 "in the course of the day" legal proceedings would be instituted to recover the same, and that the respondents were not entitled to make such a demand, but, in my opinion, a person bound to pay a sum by a certain date is not released from his obligation to do so because a demand is made upon him to pay the same on an earlier date, and inasmuch as the appellant failed to deposit the required margin before 3 p.m. on the 22nd July, 1932, I am of opinion that the respondents were entitled to cancel the contract on the 23rd July under clause 9.

As regards the contract of the 23rd March, 1932, the respondents by a letter of the 23rd July required the margin to be deposited by 12 p.m. on the 25th July. A clerk of the appellant stated at the trial that this letter was not received by the appellant until 12-50 p.m. on the 25th July. I am not prepared to place reliance upon the evidence of this witness, for not only was

he an employé of the appellant but he did not pretend to have any recollection of the matters to which he deposed. However be that as it may, it is clear that before the appellant was required to deposit the margin in respect of this contract the appellant had already failed to take delivery under each and every of the milling notices issued under this contract.

As regards the contract of the 22nd of April, 1932, the respondents required the appellant to deposit the margin by 12 p.m. on the 28th July, the time fixed for commencing milling under the earliest of the milling notices in respect of that contract being 5 a.m. on the 28th July. In my opinion, the respondents in the circumstances obtaining in the present case were justified under clause 9 in cancelling each of the contracts in suit. I am of opinion that the respondents were entitled to recover damages for the failure of the appellant to take delivery on the dates and at the mills duly fixed in that behalf under the contracts, and there is no ground in law or in fact upon which either of the contentions relied upon by the appellant can be supported. The appeal fails, and must be dismissed with costs.

MYA BU, J.—I agree.

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