APPELLATE CIVIL.

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

CHIN GWAN & CO.

v.

ADAMJEE HAJEE DAWOOD & CO.*

1933
Feb. 21.

Contract—Sale of goods—Excise duty—Publication by Government—Parties ignorant of proposed duty—Seller's demand for duty besides price—Mutual mistake, what is—Contract Act (IX of 1872), s. 20—Tariff Act (VIII of 1894), s. 10.

The plaintiffs bought from the defendants a certain quantity of matches, delivery being immediate. On the date of the contract and unknown to the parties Government published a Bill for levying an excise duty on matches. The defendants then refused to deliver the goods to the plaintiffs unless the latter paid, in addition to the price, the proposed excise duty. The plaintiffs sued the defendants for damages for breach of contract. The trial Court dismissed the suit on two grounds, namely, that the defendants were justified under s. 10 of the Tariff Act in cancelling the contract on the refusal of the plaintiffs to pay the proposed duty, and that the case was within s. 20 of the Indian Contract Act. The plaintiffs appealed.

Held, reversing the trial Court, (1) that s. 10 of the Tariff Act did not justify the respondents in demanding the proposed excise duty and in refusing to give delivery. The proposed duty was not actually imposed on the date of delivery and in the event might never be imposed; (2) that s. 20 of the Contract Act had no application to the facts of the case. Where there is a mutual mistake as to a fact which goes to the root of the contract and frustrates the object of the agreement s. 20 will apply, but it has no application where, if a vendor had known certain facts, he might not have agreed to sell the goods at the contract price.

Krishnasawmy for the appellants. A contract to sell matches does not become void by reason of an excise duty levied on such articles subsequent to the date of the agreement. S. 20 of the Contract Act cannot apply to such a case, because there is no mutual mistake as to a fact essential to the contract. The vendor has failed to deliver the goods on the appointed date, and he is therefore liable in damages for breach of contract.

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* Civil First Appeal No. 125 of 1932 from the judgment of this Court on the Original Side in Civil Regular No. 81 of 1932.

1933

CHIN GWAN & CO. v. ADAMJEE HAJEE DAWOOD & CO.

The Burma Excise Duty on Matches Act was published in the *Burma Gazette* in a Bill form on the day on which the agreement was entered into, and the vendor could have added the intended duty to the sale price. The contract was for immediate delivery of the goods and the vendor must therefore purposely have refrained from adding the extra duty to the price. Moreover, the Bill may or may not become law.

Rafi for the respondents. S. 10 of the Tariff Act states that, in the event of any excise duty being imposed on an article after a contract for the sale of such article is entered into without any stipulation as to duty, the vendor can add such duty to the sale price. That is what the vendor is seeking to do here. It is also clear that the terms of s. 10 (*a*) are intended to apply retrospectively. The Burma Excise Duty on Matches Act came into force while the present suit was pending, and the respondents were justified in refusing to deliver unless the extra duty was paid.

In *Narayana Chettiar* v. *Kadir Sahib* (1) the facts were exactly the reverse. The duty was reduced subsequent to a contract for the sale of salt, and the vendor obtained a refund from the Government of the excess duty. It was held that the purchaser was entitled to that refund even though s. 10 contained no express provision to that effect. *A fortiori* in this case where there are clear words to the effect that the vendor can add the duty to the sale price.

PAGE, C.J.—This appeal must be allowed.

It is common ground that on the 23rd of January 1932 the appellants bought from the respondents 500 tins of red scissors brand matches at Rs. 8-12-0 per

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(1) I.L.R. 53 Mad. 680.

tin net and 500 tins of polo brand matches at Rs. 8-12-0 per tin net, the terms of the agreement being set out in a stamped memorandum. Under the contract the appellants were entitled to receive immediate delivery of the goods. On the following day the respondents refused to give delivery of the matches under the contract unless in addition to the contract price there was added a sum equal to the proposed excise duty set out in a Government notification published in the *Burma Gazette* of the 23rd of January 1932.

On the 30th January 1932, in a letter from the learned advocate for the respondents to the learned advocate for the appellants, the respondents claimed that they were entitled to receive payment from the appellants, against delivery of the matches, of the purchase price *plus* the proposed duty of Rs. 6-4-0 a tin.

It is common ground that the respondents did refuse to deliver the goods to the appellants on or about the 30th January 1932 for the price set out in the agreement of sale, and it is also common ground that after the 23rd January 1932 the appellants were unable to purchase matches of a like description in the market at less than Rs. 15 per tin, that is, for the contract price and in addition the amount of the proposed excise duty.

The appellants brought the present suit to recover the difference between the contract price and the price which they would have to pay in the market for goods of a like description at the date when the respondents refused to deliver the goods pursuant to the contract.

At the hearing of the appeal the respondents contended that, inasmuch as the Bill published in the Gazette of the 23rd January 1932 became law in April 1932, they were entitled on the 24th January 1932 under s. 10 of the Tariff Act of 1894 to

1933

CHIN GWAN & CO. v. ADAMJEE HAJEE DAWOOD & CO.

PAGE, C.J.

refuse to deliver the goods under the contract unless the appellants against delivery paid in addition to the contract price the amount of the duty which subsequently was imposed in respect of those goods.

It is unnecessary for the purpose of deciding this appeal to determine whether s. 10 upon a true construction of its terms operates retrospectively; but, in my opinion, the respondents on the 24th January 1932 were not entitled to refuse to deliver the goods under the contract unless the appellants paid the proposed duty in addition to the contract price, because at the date when the respondents refused to give delivery no excise duty had been imposed. The effect of s. 10 of the Tariff Act of 1894 in the circumstances of the present case may be to entitle the respondents to claim from the appellants a refund of any sum which the respondents might have to pay in respect of the excise duty that was imposed in April 1932, but at the date when the respondents refused to deliver the goods against payment of the contract price the excise duty had not been imposed, and in the event might never be imposed. In my opinion in such circumstances the respondents under the terms of their contract with the appellants, notwithstanding s. 10 of the Tariff Act, were not entitled either to refuse to give delivery of the goods against the contract price, or to call upon the appellants to deposit with the respondents in addition to the contract price a sum sufficient to cover the proposed duty.

In my opinion the appeal must be allowed. The learned trial Judge dismissed the appellants' claim on two grounds, (1) that under s. 10 of the Tariff Act the respondents were entitled to cancel the contract of sale on the refusal of the appellants to

pay the proposed duty set out in the notification, and (2) that the case was brought within s. 20 of the Indian Contract Act.

As regards the first ground, for the reasons that I have stated, with all respect to the learned trial Judge, I am of opinion that s. 10 of the Tariff Act affords no defence to the appellants' claim.

As regards the second ground I cannot persuade myself, with all due deference, that s. 20 of the Contract Act has any application to the facts of the present case. S. 20 runs as follows :

> "Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.
>
> *Explanation* : An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact."

It was not essential to this agreement that at the time when they entered into it the appellants and the respondents should have known of the excise duty that was proposed in the notification of even date. It may well be that if the respondents had known of the proposed excise duty they would have charged a higher price for the goods. But it was not essential that they should have done so. I can think of many business reasons why they should have been content to charge a lower price. Merely because it turns out that if a vendor had known certain facts he might not in his discretion have agreed to sell the goods at the contract price, in my opinion, is not a ground for applying s. 20 of the Contract Act. Of course, where there is a mutual mistake as to a fact which goes to the root of the contract, and frustrates the object of the agreement, s. 20 will apply ; the illustrations to s. 20 indicate

1933

CHIN GWAN & CO. v. ADAMJEE HAJEE DAWOOD & CO.

PAGE, C.J.

what the Legislature intended to enact under that section. But where one of the parties to an agreement knows a fact which makes his bargain an advantageous one, and that fact is unknown to the other party of the agreement, the other party remains bound by the contract unless there is an obligation on the party knowing the fact to disclose it to the other party to the contract. Mr. Rafi, who very fairly argued the case on behalf of the respondents, in the course of the hearing stated that he could not press this ground upon which the learned trial Judge had relied in his judgment.

Fraud on behalf of the appellants was neither pleaded nor raised by way of an issue nor proved at the hearing, and no further reference need be made to it.

We do not desire by reason of anything that is laid down in this judgment to prejudice any claim that the respondents may properly make to recover from the appellants the excise duty in respect of these goods which they may have been called upon to pay, and have paid. It is unnecessary to consider this question for the purpose of determining the present appeal.

For the reasons that I have stated, in my opinion, the appeal succeeds, and the order of the trial Court must be set aside, and a decree passed in favour of the appellants for the sum claimed with costs in both Courts.

MYA BU, J.—I agree.