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PRIVY COUNCIL.

HOE KIM SEING

v.

MAUNG BA CHIT.

* J.C. 1935

July 11.

[On Appeal from the High Court at Rangoon.]

Sale of Goods Act (III of 1930), ss. 19 to 24—Sale of ascertained quantity of paddy—Bought and Sold Notes—Time when property passes—Intention of contracting parties, how ascertained.

Contracts for the purchase of a specific quantity of paddy stored in godowns were made by Bought and Sold Notes in which the sale price was entered. The intention of the parties as to the time when the property was to pass was not expressed in the contracts. Earnest money and part payments of the price were made and, when the balance of the purchase price was paid, an entry of its receipt was made in the Sold Notes.

Held, that in the circumstances of the case, the parties to the contract intended that the property should pass on the payment of the balance.

The rules embodied in ss. 20 to 24 of the Sale of Goods Act (III of 1930) are rules for ascertaining the *prima facie* intention of the parties and must yield to any contrary intention which may be gathered from the circumstances of the case. The question of the intention of the parties must, in the absence of an express term in the contract, depend upon the peculiar features of each transaction.

Remarks of Cockburn C.J. in *Martineau* v. *Kitching*, (1872) L.R. 7 Q.B. 436 at pp. 449 and 450 approved.

Judgment of the High Court reversed.

Appeal (No. 76 of 1934) from a decree of the High Court (June 21, 1933) reversing a decree of the District Court of Pegu (September 29, 1930).

Contracts were made for the purchase of paddy by Bought and Sold Notes, counter-parts of each other. The material terms of the notes were as

* *Present* : LORD ATKIN, SIR JOHN WALLIS and SIR SHADI LAL.

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follows, the sale of a second lot of 7,000 baskets of paddy being on similar terms to the sale of the first lot of 21,000 baskets:

"DEED OF SALE OF PADDY.

Sale of paddy (lying) in the granary is made at Peinzalok Town and the terms are as follows:

On the 24th April, 1930, the whole contents about 21,000 baskets in total of *kaukngè* paddy from 3 rooms in U Maung Gyi's granary belonging to U Po Thin are sold at the rate of Rs. 160 per hundred baskets of paddy. (Baskets and methods of measurement described.) As regards the date for taking delivery of paddy, if the paddy is taken within one month from the date of the execution of the deed, it shall be taken on payment of money. The buyer shall pay the money fully in respect of the remaining paddy which has been left in the granary. (The seller undertakes the paddy shall be uniform etc.) The buyer Mg. Ba Thein (in plural) makes the purchase on payment of Rs. 2,100 as earnest money. If the buyer makes any default as mentioned in the above deed, he loses the earnest money . . . The sale is made with the consent of both the parties and the deed is signed herein-below."

Part payments were made and endorsed on the Sold Notes. On July 5, 1930, the balance due to complete the purchase price was made and endorsed on the Sold Notes.

The circumstances attending the transaction are stated in the judgment of the Judicial Committee.

The District Judge held that the property passed on payment of the balance on July 5. The High Court dissented from that view and held, applying s. 22 of the Sale of Goods Act that the property would not pass till the paddy was measured.

May 13, 14. DeGruyther K.C. and *Pennell* for the appellant. The case falls to be decided under the Sale of Goods Act which came into force on July 1, 1930. Under that Act, the time when the property

in the goods passes depends on the intention of the parties. When the intention is not expressed, it must be ascertained from the conduct of the parties and the circumstances of the case. The rule does not differ from the English rule as laid down by Cockburn C.J. in *Martineau* v. *Kitching* (1). The rules in ss. 20 to 24 of the Act are merely rules for ascertaining the intention. They are not exhaustive and when an intention contrary to any of these rules is clearly ascertained, it will prevail over the rule. Here it was clearly the intention of the parties that the property was to pass on payment of the agreed price. The balance due on July 5 was ascertained, not from measurement of the paddy, but from the price fixed in the contracts.

Leach for the respondent. The Bought and Sold Notes speak of taking delivery of the paddy. This suggests that something remained to be done. Po Ni was heavily involved and any transfer by him to the appellant would be a fraudulent preference under s. 54 of the Provincial Insolvency Act (V of 1920). That question was raised in the High Court, but the High Court would not allow it to be taken.

[LORD ATKIN : The payments to the vendors had been made with funds furnished by the appellant and, in completing the sale, he was merely protecting his own interests. There was nothing fraudulent about it.]

Leach : When Po Thin made over the Bought Note, he got from the appellant's agent a receipt stating that delivery must be taken within 25 days and that if the paddy were burnt after that he would

(1) (1872) L.R. 7 Q.B. 436, 449.

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not be responsible. That shows he was to be regarded as the owner till delivery.

[LORD ATKIN : He was custodian of the paddy for the purchaser and was merely limiting his liability. The ownership had passed.]

July 11. The judgment of their Lordships was delivered by

SIR SHADI LAL : This appeal from a judgment of the High Court of Judicature at Rangoon raises the question whether the property in certain paddy belonging to one Maung Po Ni had passed to the appellant, Hoe Kim Seing, before the date on which the estate of the former vested in the Official Receiver who was appointed by the Court adjudging him an insolvent.

The circumstances, which have led to the dispute, may be briefly stated. Maung Po Ni (hereinafter called Po Ni) was a cultivator of paddy in Burma and also dealt in the purchase and sale of that commodity. He made his purchases with borrowed capital, and in 1930 he was indebted to several persons, including the appellant who was a merchant doing business on a large scale in the purchase of paddy. He had advanced about two lakhs of rupees to Po Ni for the purchase of paddy, which was to be delivered by the debtor to the creditor in satisfaction of the debt.

It appears that Po Ni was unable to discharge his liabilities, and, accordingly, on July 22, 1930, he presented to the Court of the District Judge at Pegu a petition to be adjudged an insolvent. On August 16, 1930, the Court made an order of adjudication, and appointed the respondent Maung Ba Chit to be the receiver of the insolvent's estate. This order took effect from July 22, 1930, the date of the

presentation of the petition ; and it is clear that the whole of the property, which belonged to the insolvent at that date, vested in the Official Receiver.

Now, it may be stated at the outset, that this appeal is not concerned with the insolvent's paddy which was stored at Nyaunglebin in the Pegu district, and that the dispute between the parties is now confined to the paddy which was stored at another place called Peinzalok situated in the same district. That paddy consisted of 28,000 baskets, and it is common ground that 21,000 baskets thereof were stored in a granary having three compartments, each containing 7,000 baskets, and that the remaining 7,000 baskets were stored in another go-down. The paddy stored in the granary of three compartments was originally the property of one Po Thin, who, on April 24, 1930, entered into a contract with Po Ni for its sale. On that date the seller executed in favour of the buyer a document called "Sold Note", and the latter executed a corresponding document called "Bought Note". These notes recorded the sale of the paddy to Po Ni at the price of Rs. 160 for 100 baskets, and the receipt by the seller of Rs. 2,100 as earnest money. The parties are agreed that the seller subsequently got, in part payment of the price, Rs. 12,000 on May 24, Rs. 2,000 on June 15 and Rs. 9,000 on June 22. After making these payments, the purchaser was liable to pay only Rs. 8,500, which represented the balance of the price for 21,000 baskets of paddy.

The second lot of paddy measuring about 7,000 baskets belonged to one Hubba, and he sold it to Po Ni on April 25, 1930, at the same rate, *viz.*: at Rs. 160 for 100 baskets. The notes exchanged between the parties contained similar terms, except that the seller received on that date Rs. 600 as

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earnest money. There is ample evidence, and indeed it is not disputed, that the buyer paid to the seller also another sum, Rs. 100, on that very date, and Rs. 6,000 on May 21, 1930. The balance of the price to be paid by him was, therefore, reduced to Rs. 4,500. Of this lot of paddy, 1,164 and 720 baskets were received by him on May 26 and May 27, 1930, respectively, and consigned by him to the appellant at Rangoon. The paddy which then remained in the go-down was about 5,116 baskets.

This was the state of things on July 5, 1930, when the appellant, Hoe Kim Seing, learned at Pegu that the creditors of Po Ni had attached the paddy which was stored at Nyaunglebin. The appellant, who had to recover from him a large sum of money, was naturally anxious to obtain immediate possession of the paddy stored at Peinzalok, which his debtor had purchased, either at his instance, or with the money advanced by him. Accordingly, he forthwith sent his agent, Bun Kyan, with Rs. 15,000 to Peinzalok, and instructed him to pay the balance of the price due to Po Thin and Hubba, in order to take delivery of the goods sold by them. On the afternoon of that day, Bun Kyan accompanied by Po Ni arrived at Peinzalok, and paid Rs. 8,500, the balance of the price, and Rs. 300, interest on that sum to Po Thin, and Rs. 4,500 to Hubba; and thereby satisfied in full the claims of both the vendors. The receipt of the money was duly endorsed by each vendor on his "Sold Note".

It was not until after July 5, 1930, that part of the paddy stored at Peinzalok was attached at the instance of certain other creditors of Po Ni, who had sued him for the recovery of the debts due to them. It appears that on July 6, 10,000 baskets out of the paddy, which originally belonged to Po

Thin, were attached ; and that two days later some paddy out of each lot was attached.

This, in brief, is the history of the paddy which is the subject of controversy between the parties, and the question is whether the property in the goods had passed to the appellant on July 5. The District Judge answered the question in the affirmative, but the High Court dissented from that view and held that the property would not pass from the seller to the buyer " unless, and except in so far as, the measurement of the paddy " was effected before the attachment.

Now, the rule for determining the time when the property in the goods passes to the buyer is contained in s. 19 of the Indian Sale of Goods Act (III of 1930). That section provides that in the case of a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. It is, therefore, clear that the intention of the parties is the decisive factor in determining the issue ; and, if that intention is expressed in the contract itself, no difficulty arises. But where the contract contains no such express provision, the intention has to be gathered from the conduct of the parties and the circumstances of the case.

The rules for ascertaining the intention are embodied in ss. 20 to 24 of the Act, and one of these rules is to the effect that where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof ; *vide*, s. 22 of the Act. It is this rule which has been invoked by the learned Judges of the High Court for deciding

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that the appellant should be held to be the owner of only the paddy which had been measured before the attachment.

The contracts in the present case were admittedly for the sale of specific goods which were in a deliverable state, but their Lordships after perusing the documents containing the terms of the contracts are unable to find any express intention of the parties as to the time when the property was to pass to the buyer. The documents, not only are couched in inelegant and ambiguous language, but appear to be unintelligible in important particulars. There is, however, nothing to indicate that the goods were to be measured for the purpose of ascertaining their price, or that the measurement, if any, was to be done by the sellers. It is true that the price of the paddy was fixed at the rate of Rs. 160 for 100 baskets, but the quantity of the paddy in each lot was declared in the notes exchanged between the parties to the contract, and it required only a simple calculation to determine the total price to be paid for each lot. Indeed, the parties understood that it was the price for the quantity mentioned in the relevant note which was to be paid by the buyer to the seller ; and it appears that, on July 5, 1930, when the balance of the price thus calculated was paid in each case, the seller parted with the goods without retaining any lien upon them. The measurement, if any, was to be made by the buyer in order to satisfy himself that he had got the quantity he had bargained for, and that the price paid by him was really due to each of the sellers. Such measurement did not affect the transfer of the property in the goods.

Moreover, the rule relied upon by the High Court, being only a rule for ascertaining *prima*

facie the intention of the parties must yield to any contrary intention which may be gathered from the circumstances of the case. The question in each case is what was the real intention of the parties, and that intention must, in the absence of an express term in the contract, depend upon the peculiar features of each transaction. As observed by Cockburn C.J. in *Martineau* v. *Kitching* (1):

"There is nothing to prevent a man from passing the property in the thing which he proposes to sell and the buyer proposes to buy, although the price may remain to be ascertained afterwards. We are dealing with the case of a specific chattel. I agree to sell to a man a specific thing—say, a stack of hay, or a stack of corn? I agree to sell him that specific thing, and he agrees to buy it; the price undoubtedly remains an element of the contract, but we agree, instead of fixing upon a precise sum, that the sum shall be ascertained by a subsequent measurement. What is there to prevent the parties from agreeing that the property shall pass from one to the other, although the price is afterwards to be ascertained by measurement? I take it that is the broad substantial distinction. If, with a view to the appropriation of the thing, the measurement is to be made as well as the price ascertained, the passing of the property being a question of intention between the parties, it did not pass because the parties did not intend it to pass. But if you can gather from the whole circumstances of the transaction that they intended that the property should pass, and the price should afterwards be ascertained, what is there in principle, what is there in common sense or practical convenience which should prevent that intention from having effect?".

Now, the circumstances of the present case make it clear that the parties to the contract intended that the appellant should become the owner of the goods on payment of the balance of the price. The major portion of the price in respect of each lot of the paddy had already been paid by Po Ni, and there is ample evidence to

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show that all the persons interested in the paddy, *viz.*: Po Thin, Hubba and Po Ni, met on the afternoon of July 5, 1930, in order to transfer the goods to the appellant who had advanced a large sum of money for their purchase. The price still due to each of the sellers was then calculated and promptly paid by the appellant's agent so that the property in the goods should pass to Po Ni and from him to the appellant. Nothing remained to be done by the sellers to complete the transfer of the ownership to the appellant; and it can hardly be suggested that he made the payment on that date to benefit the other creditors of Po Ni by facilitating the seizure of the goods in satisfaction of their claims. The suggestion is too fantastic to deserve any serious consideration.

Their Lordships are satisfied that the appellant paid the money on July 5, 1930, to discharge the claims of the sellers for the balance of the price, and to acquire the property in the goods. It is obvious that the intention of the parties was that he should become the owner of the paddy as soon as he had made the payment. The passing of the property did not, therefore, depend upon the measurement; and neither the attachments nor the order of adjudication could adversely affect the title which had vested in him.

In the result the appeal should be allowed, the judgment of the High Court set aside, and that of the trial Judge restored. The Official Receiver must pay the costs incurred by the appellant here as well as in India. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *J. E. Lambert.*

Solicitors for respondent: *Cutler, Allingham & Ford.*