APPELLATE CIVIL.

Before Addison and Bhide JJ.

1930

Oct. 13.

BASHESHAR LAL-BANSI DHAR (PLAINTIFFS) Appellants

versus

BHIK RAJ AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 2433 of 1923.

Contract—Sale of goods—to be delivered in instalments —whether entire or divisible—question of fact to be decided in each case—Limitation—where contract is entire.

The question whether a contract of sale of goods to be delivered by monthly shipments, is an entire or divisible one, must be decided on a consideration of all the circumstances of each particular case. Where the contract fixed no definite instalments, nor specified any period for the delivery of any instalment, or stated distinctly that the goods of each shipment were to be delivered separately, and goods of more than one shipment had at times been delivered together under the contract, the quantities of the different shipments having been arbitrarily fixed by the sellers.

Held, that all these facts indicated that the intention was to contract for the delivery of the entire lot;

Hence, the cause of action for breach of the contract by the sellers could not arise, nor the period of limitation start to run, till the expiry of the period for the delivery of the goods of the last shipment.

Ganesh Das-Ishar Das v. *Ram Nath* (1), *Phul Chand-Fateh Chand* v. *Chhote Lal-Amba Pershad* (2), and *Amba Pershad-Gopi Nath* v. *Jawala Dat-Ram Kanwar* (3), relied on.

Benjamin on Sale, page 800, referred to.

First appeal from the decree of Diwan *Som Nath, Senior Subordinate Judge, Delhi, dated the 30th April 1923, directing that the defendants to pay to the plaintiffs the sum of Rs. 2,000 with interest.*

(1) (1928) I. L. R. 9 Lah. 148. (2) (1925) 90 I. C. 654.
(3) (1926) 94 I. C. 629.

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JAGAN NATH AGGARWAL, HEM RAJ MAHAJAN, and SHAMBU LAL PURI, for Appellants.

MEHR CHAND MAHAJAN, and JAGAN NATH BHANDARI, for certain Respondents.

BHIDE J.—The parties to this suit entered into a contract for sale of goods, the terms of which will be sufficiently clear from the "sold" note handed over by the defendants to the plaintiffs, which ran as follows :—

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"We have sold to you 90 (ninety) cases of white shirting D-1 at 17*s*. 3*d*. (seventeen shillings and three pence) of November, December, January, February, March and April shipments which were purchased by us from the Bazar. We will receive net profits at the rate of Rs. 1-8-0 per piece. The expenses incurred by us shall be borne by you. We will receive net profits at the rate of Rs. 1-8-0 (rupee one and annas eight) per piece. The terms of the contract shall be similar to those of the office of R. J. Wood. We will give you pattern and invoice as soon as they are received. You shall have to take delivery of the goods on payment of the money in the Bank. If you take delivery of the goods afterwards, you shall have to pay interest and godown rent according to the terms of the office."

Plaintiffs alleged that the defendants had failed to deliver 2 bales of the March shipment and 15 bales of the April shipment according to the above contract and sued for Rs. 7,762-8-0 as damages. The trial Court found that the defendants had failed to deliver 7 bales out of the shipments for December 1916 and January 1917 and 10 bales out of the shipment for April 1917, but held that the suit was

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time-barred with respect to the former, and granted a decree for Rs. 2,000 as damages with respect to the non-delivery of the latter 10 bales only. From this decision the plaintiffs have appealed.

Only two points have been pressed by the learned counsel for the appellants, *viz.* (*i*) that the suit was not time-barred with respect to the 7 bales referred to above and (*ii*) that the damages have been under-assessed. As regards the first point, the learned counsel's contention was that the contract for the sale of 90 bales was an "entire" one and the cause of action did not arise till the expiry of the period for delivery of the last shipment. He relied upon the following rulings in support of his contention, *Ganesh Das-Ishar Das* v. *Ram Nath* (1), *Phul Chand-Fateh Chand* v. *Chhote Lal-Amba Pershad* (2), *Amba Parshad-Gopi Nath* v. *Jawala Dat-Ram Kanwar* (3). The learned counsel for the respondents, on the other hand, contended that the contract was a "divisible" one and that the contract for the delivery of each instalment was a distinct contract as no intalment could be taken delivery of without paying for the same. In support of this contention he referred to the commentary on pages 799-800 of "Benjamin on Sale," but the learned author of that work has himself pointed out that "even when instalments are to be separately paid for, the contract may be entire," (see page 800).

The question whether a contract is an entire or divisible one is often a difficult one to decide. Each case has to be decided on a consideration of all the circumstances and hence the rulings cited are not of

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much assistance in deciding the point. In the present instance, after considering the terms of the contract and the conduct of the parties in dealing with it, I am of opinion that the contract was an entire one. No definite instalments were fixed by the contract, nor was any period specified for the delivery of any instalment. In fact, the contract does not even say distinctly that the goods of each shipment were to be delivered separately and in point of fact, goods of more than one shipment were at times delivered together. The quantities of the different shipments were also not equal and appear to have been arbitrarily fixed by the sellers. All these facts seem to indicate that the intention of the parties was to contract for the delivery of the entire lot of 90 cases. The oral evidence of the parties is to the same effect. It is true that goods of certain specified "shipments" were to be delivered, but this appears to have been stipulated merely for the sake of convenience in the matter of delivery and payment. I, therefore, hold that the contract in the present instance was an entire one.

On the above finding, the cause of action for the breach of the contract could not arise till the expiry of the period for the delivery of the goods of the last shipment. In this aspect of the case, the claim with respect to the non-delivery of the 7 bales of the December-January shipments was not time-barred and this fact was conceded by the learned counsel for the respondents.

The next point for decision in this appeal is the amount of damages to which the plaintiffs are entitled. The learned Judge of the trial Court has assessed the damages on the basis of the market price

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prevailing at the time when the goods were due to be delivered—fixing the latter time by allowing a period of about four months from the date of shipment for the arrival of the goods in Delhi where the goods were to be delivered. The learned counsel for the appellants contended that the shipments were in fact late and the goods did not arrive in Delhi within four months of the date of shipment. He, therefore, contended that the market rate prevailing on the dates when the goods of the shipments in dispute reached Delhi should have been taken as the basis for assessing damages. There is, however, no evidence on the record to show that the period for those shipments was extended with the consent of the parties. The correspondence at pages 8 to 10 of the printed record shows that the plaintiffs were not bound to accept goods of late shipments. It cannot, therefore, be presumed in the absence of evidence to that effect that delay was waived in the case of the undelivered bales.

The learned Subordinate Judge has allowed a period of about four months for transit in calculating the "due dates" for delivery as stated above, and this fits in closely with the time actually taken in transit by the goods shipped in April (see statement at pages 45-51 of the printed record). There is, therefore, no good ground for interference with the amount of damages allowed by him in the case of the April shipment. As regards the non-delivery of the goods of the December-January shipments, it would appear from the statement referred to above that the latest date of arrival was about June 1917. The evidence on the record shows that the prevailing market rate in that month was about Rs. 15-12-0 or

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Rs. 15-14-0 per piece. The plaintiffs averred in the plaint that the cost price per piece was Rs. 16 per piece. The learned Subordinate Judge has taken the cost price to be Rs. 15 per piece, but the reason given by him for adopting this figure does not appear to be sound. He says that the figure in the plaint was probably incorrect and given inadvertently. But the plaintiffs did not apparently allege that there was any mistake or attempt to amend the plaint. Moreover, the learned Subordinate Judge's own calculation of the cost price was only approximate and in the circumstances there was, in my opinion, no sufficient justification for taking the cost price to be lower than what was alleged by the plaintiffs. Taking Rs. 16 per piece to be the cost price, the plaintiffs are not entitled to any damages in respect of the December-January shipments, as the market rate was lower than this figure.

I would therefore dismiss this appeal, but in view of all the circumstances leave the parties to bear their own costs in this Court.

ADDISON J.—I agree. ADDISON J.

N. F. E.

Appeal dismissed.