APPELLATE CIVIL.

Before Addison and Beckett JJ.

1934

June 6.

RAGHU MAL-JAGGU MAL (PLAINTIFF) Appellant

versus

RAM SARUP AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 2585 of 1926.

Mercantile Contract—Vendee refusing to take delivery of the goods—Contract providing for seller's invoice to be taken in lieu of draft—and for seller's right to re-sell on failure of purchaser to accept draft and pay at maturity—Construction of—whether seller has right of re-sale where seller's invoices only are sent and no draft—Unreasonable delay in selling—whether bars the remedy.

Certain cases of piece-goods, the shipment of which had been fixed for certain dates, were purchased by the plaintiffs from the importers and sold by them to defendants. On arrival of the goods, defendants did not take delivery and plaintiffs, after giving notice, re-sold the goods and sued defendants for the loss incurred on the re-sale. The contract of sale provided in clause 1:—"We hereby agree to purchase from you the undermentioned goods * * * * and for re-imbursement we authorise you to draw upon us at thirty days' sight * * * * . In case of need, seller's invoice to be taken in lieu of draft."

And in clause 3: "Should we fail to accept the draft on presentation and—or—fail to pay it at maturity, we hereby authorise you * * * to sell the goods * * * ."

Admittedly seller's invoices were sent to the defendants, but no draft.

Held, that under clause 3 of the contract the right of re-sale is conferred on the seller only when a draft has been presented and, the words of the contract being clear, the Court cannot add to the clause words which did not exist therein; and thus there is no power of re-sale in the present case.

Narain Das-Saini Mal v. *Kidar Nath Gonika* (1), and *Nanak Chand* v. *Panna Lal-Shiv Narain* (2), followed.

(1) 1928 A. I. R. (Lah.) 817. (2) 1930 A. I. R. (Lah.) 389.

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Rattan Lal - Sultan Singh v. *Tek Chand - Chuni Lal* (1), and *Nathu Mal-Ram Das* v. *B. D. Ram Sarup & Co.* (2), not followed.

Held further, that the claim was also barred by the unreasonable delay of more than a year in re-selling the goods in the absence of proof that the due dates were extended.

Nikku Mal - Sardari Mal v. *Gur Parshad & Brothers* (3), relied upon.

And, that the plaintiff could not fall back upon the difference between the contract price and the market price on the date of the breach, as it had not been established what that difference was.

First Appeal from the decree of Sayed *Abdul Haq, Subordinate Judge, 1st Class, Delhi, dated 12th July, 1926, dismissing plaintiff's suit.*

DIWAN RAM LAL and BISHEN NARAIN, for Appellant.

MEHR CHAND MAHAJAN and KAHAN CHAND, for Respondents.

ADDISON J.

ADDISON J.—The firm Raj Karan-Ram Gopal purchased 22 cases of piece-goods at certain specified rates from Messrs. Kahn and Kahn. Shipments were fixed for certain dates. The plaintiff firm Raghu Mal - Jaggu Mal purchased this contract from Raj Karan - Ram Gopal agreeing to pay them the same rates as they had to pay Kahn and Kahn together with a profit of Rs.250 per case. The plaintiff firm, thereafter, on the 5th of January, 1920, sold the contract to the defendants at the original rates, together with a profit of Rs.300 per case. Five cases admittedly were cancelled. The defendants did not take delivery of the seventeen remaining cases and the plaintiff firm gave them notice of re-sale. Thereafter they

(1) 1930 A. I. R. (Lah.) 379. (2) 1932 A. I. R. (Lah.) 169.
(3) (1930) I. L. R. 12 Lah. 452.

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sold the goods and brought this suit against the defendants for the loss resulting therefrom. They claimed Rs.18,800-6-9 as loss and have added Rs.3,199-9-3 on account of interest. The total claim was in this way Rs.22,000. The trial Court dismissed the suit holding that proper invoices in accordance with the contract were not supplied, that the goods were not proved to have been of the quality contracted for and that the re-sale was unreasonably delayed and also was not a *bonâ fide* sale. The lower Court further held that the plaintiff firm had not proved what were the market rates on the due dates. On these findings, it dismissed the suit and the plaintiff firm has appealed. The appeal is, however, limited to Rs.19,000, interest amounting to Rs.3,000 having been given up.

It was argued on behalf of the respondents that the contract between the parties did not provide for or authorise re-sale of the goods. The two clauses of the contract, which must be referred to in order to decide this point, are clauses 1 and 3 :—

1. We hereby agree to purchase from you the undermentioned goods at the limits and terms stated below, and for re-imbursement, we authorize you or your correspondents to draw upon us at 30 days' sight with all relative shipping documents attached for payment. In case of need, seller's invoice to be taken in lieu of draft, which drafts we engage and bind ourselves to accept on presentation and pay at maturity, notwithstanding any objection we may have regarding, or on account of any variation, whatever, from the terms of the indent, such objection to be settled by arbitration, as provided for below. If draft is paid before maturity, a rebate of interest is to be

granted at the rate of 6 per cent. per annum. Draft to be made payable at————.

3. Should we fail to accept the draft on presentation and—or—fail to pay at maturity, we hereby authorise you or your agents to sell the goods by public auction or private sale, when and where you like, after having given us 10 days' notice of your intention to do so, and we bind ourselves to make good to you any loss or deficiency sustained through our default, including all charges and interest at 6 per cent. per annum, we waiving all claims to profit should there be any. In case of public auction, printed notices of sale to be distributed in the Delhi market at least 10 days before sale.

In the present case no draft was presented to the defendants. All that was done was to send the defendants the seller's invoices. Under clause 1, the seller's invoice can be taken in case of need in lieu of draft, but the only right of sale which is given by clause 3 is when the draft is not accepted on presentation and—or—is not paid on maturity. Then only are the sellers authorised to sell the goods by public auction. In the other case mentioned in clause 1, namely, where seller's invoices only are supplied, no right of re-sale is given according to clause 3. The words ' fail to pay at maturity ' in clause 3 cannot be held to include ' failure to pay in cases where invoices are taken in lieu of drafts.' It is not possible to put an equitable interpretation on the agreement seeing that the words are clear. This case is on all fours with two Division Bench decisions of this Court, namely *Narain Das-Saini Mal* v. *Kidar Nath Gonika* (1) and *Nanak Chand* v. *Panna Lal-Shiv Narain* (2). We are in agreement with these decisions and follow

(1) 1928 A. I. R. (Lah.) 817. (2) 1930 A. I. R. (Lah.) 389.

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them. That means that there was no power of re-sale in the present case under clause 3 of the contract and it is not contended that there was a general power of re-sale under section 107 of the Contract Act. This point is sufficient to dispose of the appeal which must fail on the ground that no power of re-sale is given under the contract in cases where the seller's invoice is taken in lieu of draft. Of course the plaintiffs could and did fall back on damages calculated on the difference of rates on the due dates but it is admitted that these rates have not been proved though this question was put in issue.

It was contended that two other Division Benches have taken a different view with respect to clause (3) of the above contract. The first case referred to in this connection was *Rattan Lal-Sultan Singh* v. *Tek Chand-Chuni Lal* (1). What that case decided, however, was that the seller substantially complied with the terms of a contract by forwarding to the buyer the seller's invoice and that the buyer had no excuse for withholding the payment and cancelling the contract. This is of course correct. The judgment then went on to say that counsel for the respondents feebly urged that the finding that the re-sale was a valid one was erroneous. It was held that this finding was a good one as there had been no undue delay in selling the goods. So far as the leading judgment in this case, therefore, is concerned, there is no discussion of the question whether clause (3) of the contract gives a right of re-sale, when in case of need seller's invoices are taken in lieu of drafts. The second case referred to was *Nathu Mal-Ram Das* v. *B. D. Ram Sarup & Co.* (2), where it was held that the seller by forwarding the invoice had substantially complied with the

(1) 1930 A. I. R. (Lah.) 379. (2) 1932 A. I. R. (Lah.) 169.

terms of the contract (which is undoubtedly correct) and that the failure of the buyer to make payment and take delivery conferred a right of re-sale on the seller according to the terms of the agreement. The reasoning in coming to this latter conclusion may be summed up as follows :—The use of the words ' in case of need the sellers' invoice to be taken in lieu of draft ' becomes meaningless and of no effect if the view is correct that the forwarding of the invoice is no substitute for and equivalent to the presentation of a draft as provided in clause (3) of the contract. If the forwarding of an invoice were to be considered as not being a sufficient substitute for and equivalent to the presentation of a draft, then it was unnecessary to make any provision for this in clause (1) of the contract. This reasoning, however, seems to me to miss the point. It is correct that the taking or giving of the seller's invoice in lieu of draft is a substitute for the presentation of a draft so far as clause (1) is concerned, but according to clause (3) it is only in cases where drafts are not accepted and/or where on maturity they are not paid that the right of re-sale is given. This right is not given in cases where seller's invoices are taken in lieu of drafts. It is not for the Courts to add words to clauses which do not exist. We have no hesitation, therefore, in following the two earlier rulings.

The appeal must fail on another ground. The due dates lie between September and November 1920 and the breaches of contract took place on various dates in that period. There is no allegation that the time was extended by the defendants. All that was said in paragraph 3 of the plaint was that the defendants were duly informed about the arrival of the 17 cases but did not take delivery of the goods. They

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were repeatedly asked to take delivery and eventually notice, dated 6th August, 1921, was sent to them. Notices of sale by auction were then duly published and the goods sold. This cannot be interpreted as an allegation that due dates were extended. The plaintiff firm wrote the letter, exhibit P.15, dated 6th August, 1921, to the defendants. It is to the effect that the defendants had promised that they would remove the goods in December, then in February and finally in June but had not done so and that as the plaintiff firm had no other alternative they gave ten days' notice of the auction of the goods. This is an admission by the plaintiffs in their own favour and there is no other evidence except the statement of the plaintiff to show that the defendants had promised to remove the goods in December, February or June. Besides, by these times the due dates had long expired and there can be no extension of time after their expiry. It follows that the goods should have been auctioned some short time after November, 1920.

Ram Narain, plaintiff, as his own witness gave evidence that the defendants had asked for time, but this was contradicted by Ram Sarup, defendant, as a witness. Ram Narain stated that some months before the notice of the sale the defendant Ram Sarup had been promising to take over the goods but that no one was present when these promises were made. The plaintiff firm took the goods from the Bank into their own custody in April, 1921, and kept them till they were auctioned in August, 1921. In *Nikku Mal-Sardari Mal* v. *Gur Parshad & Brothers* (1), it was held that on breach by the buyer of a contract for the purchase of goods, if the vendor chooses to enforce his right to re-sell he must do so within a reasonable time

(1) (1930) I. L. R. 12 Lah. 452.

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from the date of the breach. If that is done, the measure of damages is the difference between the contract price and the price realised on the re-sale, with the costs and expenses of the re-sale. But if the re-sale has been unreasonably delayed until the market has fallen, the price realised on re-sale will not afford a true criterion of the damages and the measure of damages will then be the difference between the contract price and the market price on the date of the breach of the contract. It was further held that in that case the delay of more than a year was wholly unreasonable. In the case before us the delay was nearly a year and there is no evidence which can be accepted that due dates were extended or even that the defendants were offering to take over the goods after the due dates. That being so, the long delay in this case was wholly unreasonable as there is evidence that the market was rapidly falling during all this period. Even, therefore, if there had been a power of re-sale under clause 3 of the contract the re-sale in the present case would have to be rejected as being belated. As already stated, the plaintiff firm cannot fall back upon the difference between the contract price and the market price on the date of the breach, as it was admitted before us that it had not been established what that difference was, although the matter was in issue.

The appeal must fail and is dismissed with costs.

The cross objections claiming costs in the trial Court are also dismissed with costs.

BECKETT J.—I concur.

BECKETT J.

C. H. O.

Appeal dismissed.