

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Russell.

SHRIDHAN GOPINATH AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS,
v. GORDHANDAS GOKULDAS (ORIGINAL DEFENDANT), RESPONDENT.*

1901.
October 18.

Damages—Assessment of damages—Contract—Breach of contract to deliver goods—Market price at due date—Suit in High Court cognizable by Small Cause Court—Decree in such suit for less than Rs. 1,000—Costs—Small Cause Courts Act XV of 1882, section 20, as amended by section 11 of Act I of 1895.

Where, for purposes of assessing damages, it is necessary to ascertain the market rate on a certain day, and evidence of alleged actual dealings on that day is given, the Court must be satisfied that such dealings were contracts made in relation to the true prices of the day, and not made merely with a view to influence the prices and therefore affording no clue to the real price at that date.

Per Jenkins, C.J. :—Obviously value created for special purposes is irrelevant, and it is for this reason that the prices made by Bulls and Bears are of no use to us. If the market value is uncertain, then we must have recourse to such surrounding circumstances as affect the probabilities and, among them, to real prices proved about the time of due date.

The plaintiffs sued the defendant for damages for non-delivery of cotton, the question between them being the market rate on the 25th May 1900, the date on which delivery should have been made. The 24th May was a holiday and it was proved beyond dispute that on the 23rd the rate was Rs. 225 per *khandi*. The plaintiffs alleged that on the 25th the price was Rs. 240 per *khandi*: the defendant alleged that it was Rs. 217 per *khandi* and counter-claimed accordingly. The plaintiffs adduced evidence of five cases of alleged actual dealings at Rs. 240 per *khandi* on the 25th May. The lower Court, however, was not satisfied that the contracts were made in relation to the true price of the day, and the Court of appeal could not say that it had misappreciated the evidence on the point. The defendant called (among others) the Chairman of the Cotton Trade Association by which the rate of Rs. 217 had been fixed for the 25th May. He, however, knew of no transactions at that rate. The lower Court found the rate on the 25th May, 1900, to have been Rs. 217 per *khandi*, and passed a decree for the defendant on the counter-claim against the plaintiffs. On appeal by the plaintiffs,

Held, that there was no satisfactory direct evidence of the actual market rate on the 25th May, 1900, but that as the evidence showed that the rate on the 23rd was Rs. 225 per *khandi* and that the market was on the rise, the conclusion might be drawn that the real rate on the 25th May was not less than Rs. 225. How much more it was, the evidence did not establish, so that the only conclusion

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was that the plaintiff had proved that on the due date the rate was not less than Rs. 225 per *khandi*—which, therefore, (and not Rs. 217) was the basis on which damages should be assessed.

The Court of appeal accordingly varied the decree of the Court below and passed judgment for the plaintiffs.

The question then arose whether having regard to section 20 of the Small Cause Courts Act (XV of 1882 amended by section 11 of Act I of 1896) the plaintiffs were entitled to costs, the decree in their favour being for less than Rs. 1,000.

Held, that no costs could be given. The mere fact that the plaintiffs claimed a sum in excess of the Small Cause Court jurisdiction was not enough to take the case out of the operation of section 20. The result of the suit showed that the true amount or value of the subject-matter was not above the Small Cause Court's limit.

The Court of appeal ordered that the defendant should get the costs in the lower Court of his counter-claim and no more, but none of the general costs of suit or the costs incurred in connection with the plaintiff's claim. No costs of the appeal.

APPEAL FROM Tyabji, J.

The plaintiffs sued the defendant for non-delivery of cotton under three separate contracts at the rates respectively of Rs. 215, Rs. 224, and Rs. 232 per *khandi*. The due date was the 25th May, 1900. The plaintiff claimed Rs. 4,016-4-0 as damages, alleging that on the due date (25th May, 1900) the rate was Rs. 240. The defendant, on the other hand, alleged that on that day the market price was only Rs. 217 per *khandi* and he accordingly made a counter-claim against the plaintiffs for the difference.

The question at the hearing was, therefore, as to the market rate on the day in question. The plaintiffs contended that they had proved five cases of actual dealings on the 25th May at Rs. 240 per *khandi*. The defendant argued that these dealings did not show the real price at the date, as they were made for the purpose of influencing the prices of the day.

Tyabji, J., held that Rs. 240 was not proved to have been the rate and accepted Rs. 217 "as a fair compromise," and on that footing passed judgment for the defendant on his counter-claim for Rs. 756 and interest.

The plaintiffs appealed.

Scott (Acting Advocate General) and *Dava*, for appellant (plaintiff).

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Rivett-Carnac and *Jardine* for respondent (defendant).

JENKINS, C.J.:—The plaintiffs and the defendant are Bombay merchants, and on the 15th, the 21st and the 24th of May, 1900, they entered into three contracts, whereby the plaintiffs agreed to purchase from the defendant 500 bales of fully good Bengal cotton for delivery between the 15th and the 25th of May, 1900. The contract rates were respectively Rs. 215, Rs. 224 and Rs. 232 per *khandi*. The contracts incorporated the rules of the Cotton Trades Association. It is alleged that of the 200 bales tendered under the first of these contracts 100 were rejected; that the whole of the 100 bales tendered under the second contract were rejected; and of the 500 bales under the third contract 100 were rejected and the rest were not delivered. Thereupon the plaintiffs brought this suit, whereby they claim by way of damages Rs. 4,016-4-0 with interest. This claim is based on the assumption that on the 25th of May, the due date, the market price was Rs. 240 per *khandi*. The defendant has put in a written statement whereby he counter-claims for Rs. 47-4-0 and Rs. 3,543-12-0. The allegation on which this counter-claim is based is that the plaintiffs claimed to invoice back the cotton under the third contract in the plaint referred to at the market rate of the due date, which was Rs. 217 per *khandi*, and that the net result thereof is that there is a sum of Rs. 3,543-12-0 due by the plaintiffs to him in respect thereof. He also alleges that the sum of Rs. 47-4-0 is due to him. Mr. Justice Tyabji held that the market rate was Rs. 217, and on that footing he passed judgment for the defendant and ordered the plaintiffs to pay to the defendant Rs. 756 for debt and interest. From this decree the plaintiffs have appealed, and the only point raised before us is, whether the learned Judge rightly fixed the market price at Rs. 217 per *khandi*.

The plaintiffs claim that they have made out that the market price on the 25th was Rs. 217, and this they say they have done by proving actual dealings at that price. The contracts of the 25th, on which they rely, are five in number, and in reference

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to them the defendant says that they were contracts made simply with a view to influencing the price and therefore afford no clue to the real price of the day. One purchase was of 100 bales from Breul & Co., made by the plaintiffs, who, the defendant contends, were bulls. Breul & Co., it is said, were the plaintiffs' commission agents, and no delivery of the goods was taken; therefore, it is contended, this was simply a transaction to raise the price of the day. As against this the Advocate General points to Mr. Campbell's statement that it was a *bona fide* contract and that cotton was delivered under it. Then there is the purchase by the Sun Mills, Limited, of 100 bales from Gaddum & Co., the memorandum of which is Exhibit X in the case. Mr. Carnac's comment on this is, that the plaintiffs were the brokers in the transaction and that it was Nagindas, the second plaintiff, who quoted the price. The evidence of Mr. Grant in reference to him is that he said he would buy any quantity at Rs. 240, "5,000, he said, he would buy." It is further pointed out that the transaction does not appear in the Sun Mills' books. All this, it is argued, shows that this, too, was an attempt to raise the price. With regard to the contract between the Mofussil Company and the Sun Mills Company, it is said that this transaction also does not appear in the books of the Sun Mills, and that the Mofussil Company were commission agents of the plaintiffs. The same criticism is urged against the other contract between these parties. Then there is the contract between Gill and Company and Tarachand Lookmandas, against which it is urged that there was no delivery under it. To this the Advocate General answers that as the price of the day was Rs. 240, there was no necessity to do anything under the contract. Mr. Justice Tyabji, before whom, of course, the witnesses were examined, was not satisfied that these contracts were made in relation to the true price of the day, and, on the whole, I do not think we are justified in saying that he has on this point misappreciated the evidence. I therefore hold that it has not been made out that Rs. 240 was the true price of the day. On the other hand, I am clear it was not Rs. 195; indeed, Mr. Carnac conceded as much.

I now, therefore, will proceed to examine the grounds on which Mr. Justice Tyabji arrived at Rs. 217. This is the note of his adjudication on this point: "I don't say Rs. 217 proved, but

I accept it as a fair compromise and as the rate admitted by the defendant." As a matter of fact Rs. 217 is the figure fixed by the Cotton Association. It is manifest that Tyabji, J., was much influenced by this fact; but though it would be a most valuable guide as to what might be a reasonable compromise, it is no evidence of actual value under the rules as existing at the date of these contracts. The same remark applies to the circumstance that settlements of disputes were actually made at that figure. The decision of the Chief Judge, too, cannot be accepted in this case, for though it may have been fully justified by the evidence before him, this case must be decided on its own evidence. What we have to determine is the market price on the 25th, the day on which the contract was broken, as that is the standard for the computation of compensation. In this investigation we must decide as best as we can on the materials before us. Obviously value created for special purpose is irrelevant; and it is for this reason that the prices made by bulls and bears are of no use to us. If the market value is uncertain, then we must have recourse to such surrounding circumstances as affect the probabilities, and among them to real prices proved about the time of due date. Now market price is to a great extent based on, and made up of the views of, those engaged in a particular business and familiar with its incidents. Those views are based not only on transactions in which a man may himself have been actually engaged, but also on the general rumour and reputation in the market. Therefore, a man may be a competent witness for the purpose of testifying to market value, though he may not himself have been engaged in or carried through any dealing in the market at the particular date in question. We cannot then exclude from consideration any evidence on this point merely because the deponent may not himself have bought or sold on the due date. Therefore, Mr. Glazebrook's evidence cannot be left out of sight and he is the principal witness in favour of the Rs. 217 rate. But what militates against his evidence is that he is the Chairman of the Cotton Association by whom the Rs. 217 was fixed. His evidence, therefore, in this case must almost of necessity have been influenced by the determination at which his Association had previously arrived. It is true that Mr. Glaze-

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brook says that Rs. 217 was a very fair rate; no doubt, it may have been a very proper rate for the Association to have arrived at for their purposes under the circumstances, but that is not enough. He admits that he heard of no contracts at that rate; in fact, he says that he did not know of any transactions except at Rs. 195 and Rs. 240 that day. He says, however, that the Association did not add up the different rates and then get the mean of Rs. 217. Mr. Grant, another witness called for the defence, does not agree on this point, for he says Rs. 217 was bulls and bears, and it must be conceded as lending support to merely a compromise between this view (1) that no contract at Rs. 217 was shown to have been made and (2) that Rs. 217 happens to be just half-way between the two extremes. In my opinion, there is no satisfactory direct evidence of the actual market rate on the 25th, but it is clear and beyond dispute that the rate on the 23rd, the next preceding open business-day—the 24th was a holiday—was Rs. 225. Further, I think Mr. Moore's evidence shows that the market was on the rise; and from this I come to the conclusion that the real rate on the due date was not less than Rs. 225. How much more it was the evidence does not establish, so that the only conclusion to which I can come is that the plaintiff has proved that on the due date the rate was not less than Rs. 225. This then must, in my opinion, be taken to be the rate for the purpose of assessing damages in this case, and it is on the basis of a market rate of Rs. 225 and not Rs. 217 that they must be calculated. To this extent the decree of Tyabji, J., must be varied.

As the result will be that the decree is for a matter of an amount or value less than Rs. 1,000, no costs can be allowed to the plaintiffs. It is argued that section 20 of the Presidency Small Cause Court's Act does not apply, but I do not agree, for the suit is not by its character excluded from the cognizance of the Small Cause Court. The mere fact that the plaintiffs have claimed a sum in excess of the Small Cause Court's jurisdiction is not enough to take the case out of the operation of section 20, for the result of the suit has shown that the true amount or value of the subject-matter was not above the Court's limit. This conclusion is in accord with the decision of the Court of appeal in England on a cognate point—*Solomon v.*

Mulliner,⁽¹⁾—and saves the section from being substantially of no use. The defendant will get the costs in the Court below of his counter-claim and no more, but none of the general costs of the suit or those costs incurred in connection with the plaintiffs' claim. No costs of the appeal.

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Decree.

Attorney for plaintiff—*Messrs. Tyabji, Dayabhai & Co.*

Attorney for defendant—*Messrs. Dicknell, Merwanji and Motilal.*

(1) (1901) L. R. 1 K. B. 76.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Crowe.

VENKATARAO KRISHNAPPA AND OTHERS (ORIGINAL PLAINTIFFS),
 APPELLANTS, v. MAHABLESHVAR AND OTHERS (ORIGINAL DEFENDANTS),
 RESPONDENTS.*

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 October 18.

Mortgage—Term of years fixed for mortgage—Mortgagor mortgaging property over a portion of which he has no right—Mortgagee's right to sell and recover money before the expiration of the period fixed—Transfer of Property Act (IV of 1882), sections 67, 68.

In 1889 the defendant mortgaged ten fields to the plaintiff to secure a loan of Rs. 2,000. The deed provided that the mortgage-debt was to become payable at the expiration of fifteen years and that in the meantime interest was to be paid yearly at the rate of 6½ per cent. per annum. In 1896 the plaintiff discovered that six of the mortgaged fields were not the property of the defendant, who had therefore no right to mortgage them, and he thereupon demanded further security from the defendant, but was refused. Only two years' interest on the mortgage-debt had been paid by the defendant. In 1898 the plaintiff filed this suit, praying for the sale of the four mortgaged fields which did belong to the defendant and for a personal decree against him.

Held, that as the defendant (the mortgagor) had failed to carry out the terms of the mortgage contract, the plaintiff (the mortgagee) was entitled to sell the mortgaged property although the mortgage term had not expired.

SECOND appeal from the decision of H. L. Hervey, District Judge of Kánara, varying the decree passed by Eknath Subrao, Subordinate Judge of Sirsi.

* Second Appeal No. 494 of 1900.