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SHAMSUDIN TAJBHAI v. DAHYABHAI MAGANLAL.

On issue No. 6 I hold the defendant's counter-claim for recovery of earnest money, &c., should be dismissed.

Solicitors for plaintiff: Messrs. *Jamshedji, Rustamji and Devidas.*

Solicitors for defendant: Messrs. *Khandvalla & Co.*

Suit decreed.

V. G. R.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

1923. *December* 4.

THE BANK OF MORVI LTD., APPELLANTS (ORIGINAL DEFENDANTS) *v.* BAERLEIN BROTHERS, RESPONDENTS (ORIGINAL PLAINTIFFS)*.

Contract—c. i. f.—June-July shipment—Agreement to extend time—No period fixed—Delivery within reasonable time—Buyer cannot reject—Conditions requisite to pass property—Suit for the price—Damages.

The defendants placed an order for 50 bales of yarn, with the plaintiffs on c. i. f. terms; June-July shipment. The plaintiffs accepted the order but intimated that it was not possible to guarantee delivery within the stipulated time and that if there was a little delay there must be no claim for late delivery. To this the defendants agreed. By August 20 the last of the bales had been shipped. The bills of lading together with the drafts were forwarded by the plaintiffs to a Bank in Bombay with instructions not to hand over the shipping documents to the defendants until they accepted and paid the drafts. The defendants refused to pay on the ground that the goods were not shipped, within the contract time. The plaintiffs having sued to recover the price,

Held, (1) that the defendants were not justified in refusing to accept the goods inasmuch as they had agreed to an extension of time and the plaintiffs had shipped the goods within a reasonable time;

(2) that as the plaintiffs had reserved to themselves the right of disposal of the goods after shipment the property in the goods had remained with them and they could not sue for the price;

O. C. J. Appeal No. 51 of 1923; Suit No. 842 of 1921.

(3) that the plaint having been amended (by leave of the Court) the plaintiffs were entitled to damages.

In the case of a c. i. f. contract, the question whether the property in the goods has passed from the seller to the buyer depends entirely on the question whether the seller has parted with the control over the disposal of the goods. He may intend to do so if he endorses the bill of lading over to the purchaser. But if he endorses the bill of lading in blank and hands it over to his agents for delivery with instructions that they shall not hand it over until the goods are paid for, then the seller has shown his intention to retain the disposal of the goods under his control.

SUIT to recover the price and alternatively for damages.

The suit arose out of a contract by which the defendants in Bombay agreed to purchase from the plaintiffs in Manchester 50 bales of American bleached yarn c. i. f., Bombay. The original offer which stipulated for June-July shipment was contained in defendants' cablegram, dated the 17th December 1919, and the offer was accepted by the plaintiffs by their cablegram of the 22nd December 1919. The plaintiffs, however, on the 24th December 1919 wrote to the defendants the letter set out in the judgment in which they stated clearly that they could not guarantee delivery and that if any of the yarns arrived a little late no claim must be made for late delivery. In acknowledging this letter the defendants by their letter, dated 23rd January 1920, noted that delivery could not be guaranteed and asked the plaintiffs to do their best to expedite shipment.

The plaintiffs shipped 10 bales on the 13th July 1920 and the defendants accepted and paid for these. As regards the remaining 40 bales, the subject-matter of the suit, these were all shipped by the 20th August 1920 and the bills of lading together with the covering drafts were despatched by the plaintiffs to the National Bank of India, Ltd., Bombay, with instructions not to part with the shipping documents to the defendants until the drafts were accepted and paid by them. The defendants having refused to accept or pay the drafts

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the present suit was instituted for the price. During the course of the trial the Court allowed the plaintiffs to amend their plaint by adding an alternative prayer for damages.

The trial Judge (Fawcett J.) held that the defendants were not justified in refusing to take delivery of the 40 bales on the ground of late shipment as the defendants had by their letter of the 23rd January 1920 agreed to an extension of time and delivery had been made within a reasonable time. The learned Judge, however, rejected the plaintiffs' claim for the price of the goods as he held that the property in the bales had not passed to the defendants on shipment, but he allowed the alternative claim for damages which he directed should be calculated at the market rate ruling at the date of maturity of the drafts.

The defendants appealed and the respondents filed cross-objections.

Sir Chimanlal Setalvad and *M. C. Setalvad*, for the appellants.

O'Gorman and *Binning*, for the respondents.

MACLEOD, C. J. :—This suit arises out of a contract by which the defendant Bank in Bombay agreed to purchase from the plaintiffs in Manchester fifty bales of American bleached yarn double 40 c. i. f. Bombay on certain terms. The contract itself is contained in two telegrams, viz., one dated December 17, 1919, despatched by the Bank to the plaintiffs at Manchester and the second despatched from Manchester by the plaintiffs on December 24, 1919.

On December 24, 1919, the plaintiffs also wrote to the Bank in Bombay as follows :—

" We duly received your two telegrams of the 17th instant asking us to place sundry orders at the best possible prices, for which we thank you. We beg to confirm our cable informing you that we had placed. " [Then

they set out the price of the goods.] "We may say that we have booked these prices at the lowest possible prices and earliest shipment. In the present state of our market it is impossible to guarantee delivery, and it must be understood, in case any of the yarns are a little late, there must be no claim for late delivery. You can, however, rely on our shipping the yarns to time, if this is at all possible."

To that letter the defendants replied on January 23, 1920, as follows :—

"We are duly in receipt of your favour of the 24th ultimo together with your sale notes for which we thank you.

"*Shipments.* We note that it is impossible to guarantee delivery in the present state of your market. We, however, hope that you will do your best to expedite the shipment as early as you can and will cable us the name of the steamer, carrying our goods."

Under the terms of the contract thus entered into the defendants had agreed to purchase fifty bales 40/2 bleached yarn at 76½ *d.* per lb. c. i. f. Bombay less 2½ per cent. discount. Shipment June-July. When the bales arrived in Bombay the defendants refused to take delivery of forty bales on the ground that they were not shipped within the shipment months. Consequently the plaintiffs filed this suit asking for a decree against the defendants for the price of the goods.

The third issue was, whether according to the terms of the contract the goods were to be of June-July shipment. The plaintiffs' contention was that by virtue of the letter of December 24, 1919, written by them and the defendants' letter of January 23, 1920, it had been agreed that the time for shipment might be extended beyond the time contained in the original contract. We agree with the conclusion which the learned Judge has arrived at, that the parties had agreed to extend the time, and as no particular period for extension was mentioned the plaintiffs were bound to deliver their goods within a reasonable time beyond the contract time. We do not think that any other construction can possibly be placed on the letters I

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have referred to. The goods in the suit arrived in three instalments on October 10, 17 and 27, 1920, and we also agree with the learned Judge that the plaintiffs tendered delivery within a reasonable time beyond the contract time, the goods having been shipped at different dates up to August 20. We think, therefore, that the defendants were not justified in their refusal to take delivery of the goods.

The next important issues were: (7) whether the plaintiffs were entitled to recover the price of the goods, and (9) to what damages, if any, were plaintiffs entitled. The plaintiffs had not claimed in the alternative in their plaint for damages and accordingly they were allowed to amend their plaint after the hearing had commenced. The learned Judge says on these issues :—

"The bills of lading in this case were endorsed in blank and sent to the National Bank with instructions not to hand over the shipping documents to the defendants unless they accepted the bills drawn upon them and paid them within the time specified in these bills. There is the clearest authority for saying that in these circumstances the property in the goods had not passed to the defendants. It is sufficient here to refer to the case of the *Ford Automobiles (India) Ltd.* v. *The Delhi Motor and Engineering Co.*[1] where the leading authorities on the question are mentioned and discussed. There was consequently no assent to the appropriation of these bales by the defendants so as to bring the case under section 83 of the Indian Contract Act. Mr. Binning eventually did not dispute this proposition and applied to amend the plaint so as to sue in the alternative for damages though for other reasons he did not formally withdraw his contention that the property in the goods had actually passed. The Court allowed the plaint to be amended accordingly, subject to reservation of the question of costs.

In this Court it has been argued for the respondents on their cross-objections that the learned Judge erred in holding that the property in the goods had not passed to the appellants and that therefore the respondents were not entitled to sue for the price of the goods. The contention is that under a c. i. f. contract

[1] (1922) 24 Bom. L. R. 1140 at p. 1148.

as soon as the goods have been placed on board, the property passes to the buyer because the goods have been appropriated to them. Section 83 of the Indian Contract Act is as follows :—

" Where the goods are not ascertained at the time of making the agreement for sale but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete."

We do not think that on this question there is any material difference between the English law of contract and the law as laid down in the Indian Contract Act. Whether the property in the goods has passed in the case of a c. i. f. contract depends entirely on the question whether the seller has parted with the control over the disposal of the goods. He may intend to do this if he endorses the bill of lading over to the purchaser. But if he endorses the bill of lading in blank and hands it over to his own agents for delivery with instructions that they shall not hand it over until the goods are paid for then clearly the seller has shown his intention to retain the disposal of the goods under his own control. See page 482 of the last edition of Pollock and Mulla's Indian Contract Act, where a reference will be found to a passage from Mr. Benjamin's treatise of the Sale of Goods which now appears at page 420 of the sixth edition. I need not cite it at length but merely refer to it as it has been mentioned with approval in *Re Cargo ex s. s. Rappenfels*[1]. That no doubt was a case before the Prize Court, but the remarks of the Chief Justice with regard to the method in which the sellers dealt with the bill of lading in the ordinary course of their dealings appear to me to be appropriate to ordinary transactions in times of peace, and the fact that the learned Chief Justice had a claim

(1) (1914) 42 Cal. 334.

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before him arising out of the seizure of a ship after the out-break of hostilities makes no difference to the pertinence of his decision and the remarks he made on the point we have to determine. In that case the goods had been shipped under a c. i. f. contract from Calcutta by a British subject on a German ship, the goods being consigned to British merchants in London although the ultimate destination of the goods was Hamburg, a German Port. In accordance with the custom of the trade, the consignors received advances of money against the documents of title from a Bank carrying on business in Calcutta, whose agents in London would, in the ordinary course of business, have realised the moneys due on the contracts from the consignees and then have made over to the consignees the documents of title to enable them to obtain delivery of the goods. At page 341 the learned Chief Justice remarks :—

"The conclusion then to which I come is that in determining the question of liability to confiscation even in the case of a subject I must have regard to the property in the goods and not the risk except so far as it may assist me in determining where the property is. To whom then did the goods belong at the time of capture ?

They were no doubt sold under a c. i. f. contract, but it was a contract 'to arrive' and it was an express term that it should be 'considered cancelled for any portion not arriving owing to loss of vessel or other unavoidable causes'.

So, even if risk be regarded as a valuable clue to property, in this case the risk during the voyage was on the seller to the extent indicated by this qualification.

But what appears to me to be decisive of this case, in view of the well-known mercantile usage that prevails in Calcutta, is the mode in which the sellers dealt with the bills of lading. They were taken to their own order and after the dealings I have already described, still are in the seller's possession.

The fair presumption in the circumstances of this case is that the sellers intended to retain and in fact did retain the property in the goods. This was a necessary reservation for the purpose of securing that method of commercial finance commonly employed by Calcutta shippers."

Then follows a reference to the remarks of Benjamin on Sale to which I have referred above. That passage

after dealing with the method of doing business proceeds thus (p. 343) :—

"It is impossible to infer that B had the least idea of passing the property to A, at the time of appropriating the goods to the contract. So that although he may write to A, and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A's account, and in accordance with A's order, making his election final and determinate, the property in the goods will nevertheless remain in B, or in the banker, as the case may be, till the bill of lading has been endorsed and delivered up to A."

There is a decision to the same effect of Mr. Justice Atkin in *Stein Forbes and Co.* v. *County Tailoring Company*[1]. The head-note runs thus :—

" By a contract of sale the defendants agreed to buy from the plaintiffs certain shipments of sheep-skins. Payment was to be ' net cash against documents on arrival of the steamer'. On the arrival of the third shipment the defendants refused to take up the documents. In an action by the plaintiffs for breach of contract, the learned Judge was of opinion that the defendants had in these circumstances been guilty of breach of contract. The plaintiffs in the action claimed the price of the goods, and on this point :

Held, that the price of the goods was not recoverable since it was not a sum payable to the plaintiffs on a day certain irrespective of delivery, and since the property in the goods had not passed to the defendants."

The learned Judge said at page 217 :—

"It was said that the property passed to the buyer on shipment, but the seller only reserved his unpaid vendor's lien. That view seems to me inconsistent with the section (section 19 of the Sale of Goods Act of 1893) I have read and with every business probability. In the majority of cases where the seller takes the bill of lading to his order the goods come forward through a banker, and it seems to me very improbable that the seller means to give to the banker or the banker to take a document representing goods the property in which is in some third person, the only security given being a right to retain possession till the fine is paid. I think the intention is to keep the property in the seller till payment."

Respondents' counsel relied very strongly on *Biddell. Brothers* v. *E. Clemens Horst Company*[2]. Apart from the fact that the point now in issue was not in issue in that case, it seems to me that the judgment of Lord

[1] (1916) 115 L. T. 215. [2] [1911] 1 K. B. 214, 934.

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Justice Kennedy, dissenting from the judgments of other members of the Court, which was approved of in the final appeal, so far from supporting the contention of the learned counsel is against him. In that case a contract for the sale of hops to be shipped from the Pacific coast to this country provided that the buyers should "pay for the said hops at the rate of ninety (90) shillings sterling per 112 lbs., c. i. f. to London, Liverpool, or Hull. . . Terms net cash". The contract contained no term expressly providing for payment against shipping documents. Mr. Justice Hamilton had been of opinion that on a contract in the above terms, the buyers were bound to pay for the hops on tender of the shipping documents, and not entitled to refuse payment until upon the arrival of the hops, they had been given an opportunity for inspection of them. This decision was reversed by the Court of Appeal. Kennedy L. J. dissenting said at page 956 :—

"Under the Sale of Goods Act, 1893, section 18, by such shipment the goods are appropriated by the vendor to the fulfilment of the contract, and by virtue of section 32 the delivery of the goods to the carrier—whether named by the purchaser or not—for the purpose of transmission to the purchaser is *prima facie* to be deemed to be a delivery of the goods to the purchaser. Two further legal results arise out of the shipment. The goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c. i. f. contract that the vendor shall, at his own costs, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use, if the goods should be lost in transit ; and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative...It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative, as consignee."

Then at page 957 his Lordship refers to a passage in the judgment of Bowen L. J. in *Sanders* v. *Maclean*[1], which is as follows :—

"[A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading

(1) (1883) 11 Q. B. D. 327 at p. 341.

by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passess by such indorsement and delivery of the bill o lading, wh[illegible]er it is the intention of the parties that the property should pass, j[illegible]as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

There was, therefore, no question in that case whether the plaintiffs were entitled to the price of the goods. The suit was one for damages. The only question was whether the defendants were justified in refusing to pay for the goods until they had been given an opportunity of inspecting them. We think, therefore, on the facts of this case that the property in the goods did not pass to the defendant Bank and, therefore, the plaintiffs were not entitled to sue for the price.

The only question remaining to be decided is the question of the measure of damages. The learned Judge has found that the market rate at the dates of breach should be taken at Rs. 2-8-0 per lb. and the decretal amount has been calculated on that basis. The defendant Bank have appealed against that finding and we must, therefore, consider the evidence on which it is based. Premising that in the case of goods of this description the prices are not quoted every day in the market, there must of necessity be very great difficulty in deciding what was the market price on any particular day or days. [After considering evidence on the point, his Lordship concluded :]

I think on the evidence which has been recorded in the case, defendants were entitled to a decision that

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the market rate prevailing at the relevant dates was Rs. 2-15-0 instead of Rs. 2-8-0. Therefore, the decretal amount in favour of the plaintiffs must be amended in accordance with our decision.

There is no substance in the other objections which appear in the grounds of appeal or in the respondents' cross-objections, and it is not necessary for me to refer to them.

As regards the order in the Court below that interest should be allowed to date of suit we cannot interfere with the discretion which the learned Judge has exercised under section 34, Civil Procedure Code. The appellants, therefore, being successful only with regard to their contention in ground No. 12 in their memorandum of appeal, and having otherwise failed in their appeal, we think that there should be no order as to costs on either side in the appeal.

With regard to the cross-objections they have failed and, therefore, the appellants are entitled to their costs of the cross-objections.

Attorneys for appellants: Messrs. *Motichand & Devidas.*

Attorneys for respondents: Messrs. *Little & Co.*

Decree varied.

V. G. R.

APPELLATE CIVIL.

1923.

November 20

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Crump.

JAGANNATH DEWKARAN MARWADI (ORIGINAL PLAINTIFF), APPLICANT *v.* DHONDU ANANDA KUÑABI (ORIGINAL DEFENDANT), OPPONENT*.

Mamlatdars' Courts Act (Bom. Act II of 1906), section 23—Collector's power to revise the order of Mamlatdar—Collector can only interfere if the order is illegal or improper.

* Civil Extraordinary Application No. 320 of 1922.