ORIGINAL CIVIL.

Before Mr. Justice Harington.

1909
May 3.

FINLAY MUIR & Co.
v.
RADHAKISSEN GOPIKISSEN.*

Contract—Sale of Goods by Description—Appropriation by Vendor—Refusal to take Delivery—Reference to Arbitration—Evidence of Assent—Action for Goods bargained and sold—Suit for Price—Contract Act (IX of 1872), s. 120.

Where in a contract for the sale of goods by description the property in the goods has passed to the buyer, section 120 of the Indian Contract Act does not deprive the seller of the form of action for goods bargained and sold, and such an action can be brought for the price of the goods, on the buyer refusing to take delivery.

Mitchell Reid & Co. v. *Buldeo Doss Khettry* (1) distinguished.

A letter of reference signed by both buyer and seller, requesting arbitrators to ascertain whether certain specific bales of goods, appropriated by the seller to the contract, are inferior in quality to the goods deliverable under the contract, and whether an allowance ought to be made, is evidence of assent by the buyer to the appropriation.

ORIGINAL SUIT.

THIS suit was instituted by the plaintiffs' firm, Messrs. Finlay Muir & Co., for the price of certain goods bargained and sold.

By a contract dated March 7th, 1908, the plaintiffs agreed to sell and the defendants to buy fifteen bales of grey C. B. dhooties of a certain size and quality at Re. 1 per pair, for shipment in April-May 1908, each instalment to be considered a separate contract, delivery to be taken by the buyers within 90 days from arrival, the goods to be paid for in cash on or before delivery or on demand or after delivery, at the option of the sellers. Provision was made in the contract for interest and the extension of time allowed for delivery. Certain other material provisions in the contract were as follows :—

"(2) If the goods are not taken delivery of and paid for as herein agreed, the sellers may re-sell them or any portion of

* Original Civil Suit No. 58 of 1909.

(1) (1887) I. L. R. 15 Calc. 1.

them or at their option cancel this contract, and they have absolute discretion as to when and how to re-sell the goods; any dispute as to damage, difference, inferiority, short quantity or measure or defect or amount of allowance to be referred to the Bengal Chamber of Commerce, whose decision shall be accepted by both parties as final and conclusive."

"(5) If the goods or any portion of same are shipped prior to the time stipulated, the buyers will not have the right of cancelling but will get extension of godown delivery if required for the period the goods are shipped prior to the time contracted for."

A number of bales of dhooties which had been shipped from England in the SS. *Sparta* by the plaintiffs' firm on the 4th March 1908, arrived in Calcutta on the 15th April. Fifteen bales out of this lot were selected by the plaintiffs' salemaster to be delivered to the defendants in fulfilment of the contract of the 7th March, and were divided into two lots—eight bales for the April shipment and seven bales for the May shipment. Out of the first lot of eight bales the defendants took delievery of two bales on the 16th April. An extension of time was granted under the terms of the contract for taking delivery of the remaining bales, which were to be delivered, six bales by the 13th August and the remaining seven bales by the 12th September 1908.

It was alleged by the defendants that, in ignorance of the actual date of shipment, they took delivery of the two bales for the purpose of satisfying themselves as to the quality and description of the consignment.

A few days after the two bales had been delivered, the defendants complained that they were inferior to sample and were damaged by mildew. An allowance of Rs. 15 per bale was accordingly made by the plaintiffs for mildew damage.

On the 22nd April 1908, a letter of reference, signed both by the plaintiffs and defendants, was submitted to the Bengal Chamber of Commerce. It was contended by the plaintiffs that this was a submission of the disputes between the parties to the arbitration of the Bengal Chamber of Commerce under

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clause 2 of the contract. The defendants contended that it was only for the purpose of surveying the goods to estimate the amount of allowance, which the plaintiffs should recommend their Home office to pay the defendants. The letter was addressed to the Registrar, Tribunal of Arbitration, Bengal Chamber of Commerce, and was as follows: "Under Regulation I, Part II of the Regulations of the above Tribunal, we the undersigned hereby apply for the appointment of two arbitrators and the issue of an award. We give particulars of the dispute below." The letter related to the inferiority in quality of the whole fifteen bales and the question of mildew damage was struck out. On the 6th May 1908, the arbitrators made their award to the effect that they found the goods were a fair tender in every respect and directed the buyers to take delivery of the same in terms of the contract.

On the 25th July 1908, the defendants' attorney wrote to the plaintiffs, stating that the defendants had ascertained that the goods tendered were not of the shipment contracted for, and claiming to cancel the contract on that ground.

In reply, the plaintiffs disputed the defendants' right to take this course. Further correspondence followed—the plaintiffs pressing the defendants to take delivery of the thirteen bales remaining undelivered under the contract, the defendants refusing to take them, on the ground that they were not of the shipment contracted for.

On the 21st January 1909, this suit was instituted by the plaintiffs for the sum of Rs. 7,971-9-6 being the price as well of the thirteen bales of dhooties which the defendants refused to take delivery of, as of the two bales delivered to the defendants, including interest. The claim of the plaintiffs for the price of the two bales delivered, was admitted by the defendants subject to an allowance for their damaged condition.

Mr. Buckland, for the defendants. This suit has been wrongly framed for the price of goods in an action for goods bargained and sold. No such action could lie under the Indian Contract Act. Where a buyer wrongfully refuses to accept the goods sold to him, the seller's only remedy under section 120

of the Contract Act, read with section 73, would be to sue for damages on the basis of the difference between the contract and market rates and not for the price of the goods : *Mitchell Reid & Co.* v. *Buldeo Doss Khettry* (1). Even if such an action would lie in India, it is essential, in order to found an action for bargain and sale, that the property in the goods should pass to the buyer, at the time the contract is effected. Subsequent appropriation would not be sufficient : Benjamin on Sale, 4th edition, pp. 1, 4, 5 ; *Scott* v. *England* (2), *Atkinson* v. *Bell* (3), *Dixon* v. *Yates* (4), *Simmons* v. *Swift* (5), *Cort* v. *The Ambergate Nottingham and Boston and Eastern Junction Railway Company* (6). In the present case, the property in the goods admittedly did not pass to the buyers at the time the contract was made. It is submitted that the property in the goods never did in fact pass to the buyers, who consistently refused to take delivery. There was no evidence of assent on the part of the buyers to the appropriation of the sellers : the letter of request did not amount to assent to appropriation ; *Mirabita* v. *Imperial Ottoman Bank* (7). Lastly, the tender was bad. Inasmuch as the contract was made on the 7th March 1908, and the goods were shipped on the 4th March, shipment before the date of the contract could not be said to be shipment *under* the contract.

Mr. Stokes (*Mr. B. C. Mitter* with him), for the plaintiffs. The Indian Contract Act does not deprive a seller of the form of action for goods bargained and sold, or disentitle him from suing for the price of goods. Precedent No. 10 in Schedule IV of the Civil Procedure Code of 1882 provides a form of pleading in such an action. *Mitchell Reid & Co.* v. *Buldeo Doss Khettry* (1) can have no application, as in that case it was found the property in the goods had not passed to the buyer. The proposition that an action for goods bargained and sold does not lie unless the contract consists of a perfect sale, is

(1) (1887) I. L. R. 15 Calc. 1.
(2) (1844) 14 L. J. Q. B. 43.
(3) (1828) 8 B. & C. 277.
(4) (1833) 5 B. & Ad. 313, 340.
(5) (1826) 5 B. & C. 857, 864.
(6) (1851) 20 L. J. Q. B. 460.
(7) (1878) L. R. 3 Ex. D. 164.

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unsupported by authority. "Sale" by section 78 of the Contract Act also includes an agreement for sale. An action for bargain and sale lies the moment the property in the goods has passed to the buyer, whether this occurs at the time of contract or subsequently: see *Rohde* v. *Thwaites* (1) which has been incorporated as an illustration to section 83 of the Indian Contract Act, *Clive Jute Mills Co.* v. *Ebrahim Arab* (2), *Juggernath Augurwallah* v. *E. A. Smith* (3). As regards the authorities cited against me, *Scott* v. *England* (4) is really in my favour, and *Atkinson* v. *Bell* (5), and *Dixon* v. *Yates* (6) have no application to the present case. It is submitted that the property in the goods did actually pass to the buyers. The contract itself gave authority to appropriate, and the goods were selected and appropriated by the vendors. The fact that the buyers disputed the quality of the goods is evidence of their assent to the appropriation. The reference to arbitration is conclusive of the assent of the buyers to the appropriation. The admitted acceptance of the two bales by the buyers implies assent: *Buchanan* v. *Avdall* (7). The defence as to shipment must fail in the face of clause 5 of the contract.

Cur. adv. vult.

HARINGTON J. The plaintiffs' claim is for the price of goods bargained and sold; the defendants plead that the action does not lie and that the goods were not shipped under the contract.

The facts which have been proved or admitted before me are that by a contract dated March 7th, 1908, the plaintiffs agreed to sell, and the defendants to buy 15 bales of grey C. B. dhooties of the size and quality described in the contract at Re. 1 per pair; shipment to be in April-May 1908; delivery to be taken within 90 days of arrival; interest to be charged at 12 per cent. on payments made after 45 days from actual delivery.

(1) (1827) 6 B. & C. 388.
(2) (1896) I. L. R. 24 Calc. 177.
(3) (1906) I. L. R. 34 Calc. 173.
(4) (1844) 14 L. J. Q. B. 43.
(5) (1828) 8 B. & C. 277.
(6) (1833) 5 B. & Ad. 313.
(7) (1875) 15 B. L. R. 276.

A number of bales of dhooties arrived in the SS. *Sparta* on April 15th—fifteen bales out of this lot were selected by the plaintiffs' sale-master to be delivered to the defendants in fulfilment of this contract and were divided into two lots, eight bales for the April shipment and seven bales for the May shipment.

Out of the first lot of eight bales, the defendants took delivery of two bales on April 16th. An extension of time was granted under the terms of the contract for taking delivery of the remaining bales, which were to be delivered—six bales by August 13th and the remaining seven by September 12th. A few days after the two bales had been delivered, the defendants complained that they were inferior to sample and were damaged by mildew. An allowance of Rs. 15 a bale was accordingly made by the plaintiffs for mildew damage. The other questions were referred to the arbitration of the Bengal Chamber of Commerce under the latter portion of clause 2 of the contract of March 7th. The question of mildew damage was struck out in the letter of reference to the Chamber of Commerce. The plaintiffs say that this was because while they disputed the buyers' complaints as to inferiority of quality, they were quite prepared to allow an abatement of price for any mildew damage which might be proved. The defendants say they consented to strike out the words, because the plaintiffs promised that if the goods were mildewed the contract should be cancelled.

On this point I believe the plaintiffs and not the defendants. *First*, because I think it very improbable that the plaintiffs would have agreed to cancel the contract on account of mildew damage when it was customary in the trade, as stated by the defendants' witnesses, to make an allowance in respect of such damage. *Secondly*, because the defendants have not pleaded that the plaintiffs agreed to cancel the contract if the goods were proved to be damaged by mildew. *Thirdly*, because when the plaintiffs offered in their letter of October 17th, 1908, to make any reasonable allowance for damaged bales, the defendants' attorneys while objecting to take damaged bales said nothing about any promise by the plaintiffs to cancel the contract if the bales were damaged.

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The letter of reference to the Bengal Chamber of Commerce was signed by the plaintiffs and by the defendants on April 22nd, 1908, and related to the inferiority of quality of the whole fifteen bales. On May 6th the arbitrators made an award to the effect that they found that the goods were a fair tender in every respect, and that the buyers were to take delivery of them under the terms of their contract.

Nothing further was done until July 25th when Brojo Lal Mookerjee wrote to the plaintiffs claiming to cancel the contract on the ground that the goods were not of the shipment contracted for. In reply, the plaintiffs disputed the defendants' right to take this course.

Further correspondence followed: the plaintiffs pressing the defendant to take delivery of the bales under the contract, the defendants refusing to take them on the ground that they were not of the shipment contracted for. The correspondence ended with a letter of December 23rd, 1908, and on January 21st, 1909, the present suit was brought.

In the course of the trial the award of the arbitrators was tendered. It was objected to by Mr. Buckland on the ground that the agreement to submit to arbitration was contained in the contract of March 7th, and that contract did not bear the 8-anna stamp required by Schedule I, Article 5 (*b*) of the Indian Stamp Act, 1899, and that as section 35 of the Act provides no instruments not duly stamped shall be acted on by any person having by consent of parties authority to receive evidence, the arbitrators were precluded from acting on it—their award, therefore, was made without authority and could not be admitted.

The plaintiffs contended that the contract of March 7th being an agreement relating to the sale of goods fell within Exemption (*a*) to Article 5 of the Schedule and did not require a stamp, and relied on *Kyd* v. *Mahomed* (1).

It is unnecessary to decide whether this objection is sound or not, because the admissibility of the award as evidence against the defendants does not depend on the submission to arbitra-

(1) (1891) I. L. R. 15 Mad. 150.

tion contained in the contract. The letter of April 22nd, signed by the defendants (as well as the plaintiffs), contains a request to the Bengal Chamber of Commerce for the appointment of two arbitrators and the issue of an award, and it sets forth in detail the buyers' complaints, and gives the numbers of the particular fifteen bales (37081-95) covered by the contract as to which the dispute has arisen. This letter clearly does not require a stamp, and any award made in pursuance of the authority contained in that letter is evidence against any person who signed the letter authorising the making of the award. The award is admissible in evidence against the defendants.

The learned counsel for the defendants contended that an action for goods bargained and sold would not lie, and that the only remedy the plaintiffs had was to sue for damages under section 120 of the Contract Act, and he cited the case of *Mitchell Reid & Co.* v. *Buldeo Doss Khettry* (1). But that was a case in which the property in the goods had not passed and so, clearly, a claim for goods bargained and sold was not sustainable. It does not lay down the proposition that where goods answering the description of the goods contracted to be sold have been sold to the buyer, and the property has passed to him, no action for goods bargained and sold can be brought. Section 120 of the Contract Act does not deprive a seller of this form of action which is recognised under the Civil Procedure Code of 1882: see Schedule IV, Form 10.

Next, the defendant says he can cancel the contract because the goods were shipped before the contract was made. I do not think that this contention is sound, because the parties have by clause 5 of the contract agreed that shipment prior to the stipulated time shall not give the buyers the right of cancelling, and, further, I believe that when the defendant took delivery of the two bales on April 16th he knew they were not of the April shipment. He says he did not, but he admits he has been seven or eight years in the piece-goods trade. I do not believe him when he says that notwithstanding his experience, that he did not know that it was impossible for

(1) (1887) I. L. R. 15 Calc. 1.

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goods arriving in a ship at Calcutta on April 15th to have been shipped during the month of April in Liverpool.

The substantial question in the case is whether the contract of March 7th has been converted into a complete bargain and sale by the appropriation of specific goods to the contract, in other words, whether the plaintiffs have only proved the breach of an agreement to sell sounding in damages, or have proved an actual sale passing the property in the goods and rendering the buyers liable to pay the agreed price therefor.

Now, there is evidence which has not been contradicted that the plaintiffs did by their sale-master select and appropriate fifteen specific bales to the contract in question.

The question then arises, did the defendant assent to the appropriation of these fifteen specific bales to the contract ?

I think that the defendants' letter to the Bengal Chamber of Commerce on April 22nd is evidence of an assent to the appropriation. They request the Bengal Chamber of Commerce by their arbitrators to ascertain whether these specific bales described by certain specific marks are inferior in quality to the goods deliverable under the contract. That seems to me to be consistent only with an assent to the plaintiffs' appropriation of those specific bales, and further, in their letter, they do not claim to be entitled to refuse the bales but say that they want an allowance. The position of the parties at the time of the reference was this. The plaintiffs had appropriated certain bales to the fulfilment of the contract with the defendants ; the defendants said they were of inferior quality and they wanted an allowance in respect of them. Both the plaintiffs and the defendants wrote authorising arbitrators to make an award on the question whether goods are inferior or not, and whether an allowance ought to be made.

In my opinion, the defendants consented to the appropriation, and the property in the goods passed to them.

The result is that the plaintiffs are entitled to judgment.

The defendants have not claimed to set off as against the price any compensation to which they would be entitled in the event of the goods being damaged by mildew. But both

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parties have agreed that if it be held that the plaintiffs are entitled to recover, the question as to what abatement, if any, of the price the defendants ought to get in respect of mildew damage shall be referred. The reference will be to some gentleman agreed on between the parties: in the event of their being unable to agree, to the Official Referee.

The plaintiffs will be entitled to judgment for the amount claimed less the sum, if any, to which the Referee finds the defendants entitled in respect of mildew damage. Costs on scale 2. Liberty to apply to enter judgment in accordance with the Referee's report.

J. C. *Judgment for plaintiffs.*

Attorneys for plaintiffs: *Manuel & Agarwalla.*

Attorneys for defendants: *Leslie & Hinds.*

LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Mookerjee.

BASARAT ALI KHAN

v.

MANIRULLA.*

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June 2.

Lease—Covenant restraining Alienation—Assignment notwithstanding such covenant, whether operative.

A lease contained a covenant in these terms: "you (the lessee) shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect." There was no right of re-entry reserved. The lessee assigned her interest under the lease:—

Held, that the assignment was operative notwithstanding the covenant.

Williams v. *Earle* (1) referred to.

APPEAL under section 15 of the Letters Patent by Basarat Ali Khan, the defendant No. 1.

* Letters Patent Appeal No. 34 of 1908, in Appeal from Appellate Decree No. 2316 of 1906.

(1) (1868) L. R. 3 Q. B. 739.