APPEAL FROM ORIGINAL CIVIL.

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

1910
Jan. 26.

KALLYANJEE SHAMJEE
v.
SHORROCK.*

Contract—Construction—"Or 700-800, say seven to eight hundred tons"—Words of description and not of estimation—Warranty—Equitable set-off.

The plaintiff, owner of a stock of coal at Shalimar Depôt, agreed to sell to the defendants "the entire stock at Shalimar Depôt or 700-800, say seven to eight hundred tons of steam coal" for immediate delivery. The entire stock at Shalimar Depôt in fact amounted to 469 tons only, which the plaintiff duly delivered. On a suit by the plaintiff for the price of the coal sold and delivered :—

Held, that the words "or 700-800, say seven to eight hundred tons," must be construed to be descriptive of the words "entire stock," and not merely words of estimation; that the delivery of only 469 tons was a breach of the contract by the plaintiff, and that the defendants were entitled to set-off against the plaintiff's claim the damages caused by such breach.

APPEAL by the plaintiff, Kallyanjee Shamjee, from the judgment of Fletcher, J.

By a contract dated the 20th November 1907, Kallyanjee Shamjee, a coal merchant and owner of a stock of coal at the Shalimar Depôt, agreed to sell to Messrs. George Henderson & Company, of which firm the respondent J. C. Shorrock was a member, "the entire stock at Shalimar Depôt or 700-800, say seven to eight hundred tons of best Kusunda steam coal freshly raised and free from shales, slates, watermarks, rubble, dust and other impurities at the rate of Rs. 9-8, say nine rupees eight annas, per ton free in boats at Shalimar." Delivery was to be immediate and payment to be made on completion of delivery. It appears that the entire stock at the Shalimar Depôt amounted to only 469 tons of steam coal. This amount was delivered to Messrs. George Henderson & Company under the contract by the 27th November 1907. On the 28th

*Appeal from Original Civil No. 51 of 1909.

November 1907, Kallyanjee Shamjee presented his bill for Rs. 4,455-8, the price of the 469 tons so delivered.

Messrs. George Henderson & Company demanded delivery of a further quantity of 231 tons of coal which they claimed to be entitled to under the contract, and on the refusal of the plaintiff to make delivery, on the 28th November 1907 they purchased 231 tons of coal against the contract, and claimed to deduct from the amount of the plaintiff's bill the difference in price which they estimated at Rs. 2,079.

This suit was instituted by the plaintiff for the sum of Rs. 4,455-8 for goods sold and delivered, and in their defence the defendants claimed to set-off the sum of Rs. 2,079 and brought the balance into Court.

On the 30th July 1909, Fletcher, J., dismissed the suit, concluding as follows :—

The real question in the case is as to what was actually sold to the defendant. Did the plaintiff intend to sell a minimum quantity of 700-800 tons, or were the words "say seven to eight hundred tons" merely words of estimation.

Mr. B. C. Mitter has cited many authorities to prove that they were words of estimation only, but those cases apply only to particular contracts. In this case the forms of the bought and sold notes are printed, and in accordance with usual commercial usage, the quantity sold and the rate appear in figures and words, it seems to me therefore to be absurd to say that the word "say" is a mere word of estimation.

I think the words "700-800, say seven to eight hundred tons" merely denote the amount of coal sold in figures and words, and the contract is for the sale of the entire stock or 700-800 tons of coal, and that the parties intended this when the contract was entered into. The plaintiff was the only party who knew the amount of the coal at the depôt at the time. The contract was entered into at a time when there was a strike on the East Indian Railway and the coal was to be in boats at Shalimar. Messrs. George Henderson & Co. stipulated for a minimum amount of 700 tons from the stock at the Shalimar Depôt. The plaintiff therefore having only delivered 469 tons was in default.

As the rate at which the defendants bought the balance of the undelivered coal is not admitted, I refer the question to the Official Referee to enquire and report as to the actual rate. Costs are reserved until the parties have enquired from the Registrar whether notice of deposit of the money in Court was given to the plaintiff. The costs of the reference are specially reserved.

From this judgment the plaintiff appealed.

Mr. B. C. Mitter, for the appellant. The main point in issue is the interpretation of the words in the contract, "the

1910

KALLYANJEE SHAMJEE v. SHORROCK.

entire stock at Shalimar Depôt or 700-800 tons." The latter words are merely words of estimation. The governing words are "entire stock;" that is an amount which can be ascertained: *Gwillim* v. *Daniell* (1). It is true that case referred to future goods; but in *McLay & Co.* v. *Perry & Co.* (2) the goods were in existence. *Leeming* v. *Snaith* (3) has no application, as the words there were "say not less than": see also Benjamin on Sale, 5th edition, page 701, and Leake on Contracts, 5th edition, page 587. Again, the defendants had no right of set-off, and the breach has not been established.

Mr. Stokes (*Mr. James* with him), for the respondent, was not called upon except as to the date of the breach, which was ultimately agreed to be taken to be the 28th November 1907.

JENKINS, C. J. This is an appeal arising out of a suit brought to recover a sum of Rs. 4,455-8 as the price of 469 tons of coal delivered by the plaintiff to the defendants. The delivery is not disputed. But it is pleaded that there has been a breach of contract on the part of the plaintiff, which entitles the defendants to set-off a sum of Rs. 2,079 by way of damages against the sum of Rs. 4,455-8, and on that footing the defendants submit that he is only entitled to receive a sum of Rs. 2,376-8, and this they offered to pay and have actually brought into Court.

The contract out of which the suit arises is contained in bought and sold notes which, though they are not absolutely in identical terms, may, as Mr. Justice Fletcher says, be taken to be identical for the purpose of the present suit. The sold note on which the plaintiff relies is addressed to Messrs. Banerjee & Co., Managing Agents, Kunji Munji & Company, who may be taken as identical with the plaintiff for the present purpose. It is signed by W. C. Banerjee and runs in these terms:—

"DEAR SIRS,

I have this day sold by your order and for your account to Messrs. George Henderson and Company, Calcutta, the entire stock at Shalimar

(1) (1835) 2 C. M. & R. 61. (2) (1881) 44 L. T. R. 152.
(3)(1851) 16 Q. B. N. S. 275.

Depôt or 700-800, say seven or eight hundred tons of best Kusunda steam coal freshly raised and free from shales, slates, water-marks, rubble, dust or other impurities at the rate of Rs. 9-8, say nine rupees eight annas, per ton free in boats at Shalimar. The sellers will not be responsible for any demurrage to the boats. Average basket weights. Payment on completion of delivery."

The principal question in dispute between the parties is whether delivery of 469 tons was, in the circumstances of this case, a sufficient performance of the contract. This turns upon the question what force should be attributed to the words "the entire stock at Shalimar Depôt or 700-800, say seven to eight hundred tons of coal." On the part of the plaintiff who, feeling himself aggrieved by the decision of Mr. Justice Fletcher, has appealed from that decision, it is urged that the mention of 700-800 tons is not binding, that it is merely a statement of expectation and nothing more, and not in any sense a warranty, and that he, the plaintiff, has performed his contract in its entirety by delivering 469 tons, that being "the entire stock at Shalimar Depôt." Mr. Justice Fletcher has not accepted that view, and in my opinion rightly. It is not of any great use to refer to decided cases for the purpose of determining the meaning of a contract of this kind. Regard must be had to the actual words used in this case, and to the circumstances under which the parties contracted and to the relative positions of the parties, so far as they are disclosed by the materials before the Court. The position then is this: the owner of this entire stock at Shalimar Depôt being a coal merchant, says that it is in quantity 700-800 tons, while there is nothing to suggest before us that the defendants ever saw the coal, or ever visited the Depôt at Shalimar. At the same time there is no evidence of any custom of trade or usage which would give to the words used any particular meaning in relation to a contract such as this. In the circumstances, I think it is a fair reading of the words to say that there was a promise by the plaintiffs that the coal which constituted their entire stock was 700-800 tons, and that it is impossible to treat the words used as a mere expression of opinion, which was not to carry with it any legal consequences.

1910

KALLYANJEE SHAMJEE v. SHORROCK.

JENKINS C.J.

Accepting that view, it necessarily follows that there has been a breach by the plaintiff of his obligation under the agreement between him and the defendants, and though the damages are at present unascertained, and the case therefore does not come within section 111 of the old Civil Procedure Code or the corresponding order of the present Code, still the circumstances are such as to entitle the defendants to rely on this by way of equitable set-off in answer to the plaintiff's claim, so far as it is available for that purpose.

The only other point in the case is whether a breach has been established. It is quite true that there is no oral evidence adduced, but at the same time it is manifest that the parties went to trial on an understanding that the case should be determined, as far as possible, on the pleadings and the correspondence; and reading the pleadings and the correspondence, I think it is established that there was a breach. If there was a breach, it is necessary, for the purpose of determining the damages, to fix the date of that breach, and it has been agreed before us by the parties that the 28th of November 1907 should be taken as that date. The decree as drawn up provides for a reference to the Official Referee to inquire and report what damages were sustained by the defendants by reason of the non-delivery of the portion of the coal contracted to be supplied by the plaintiff as in the pleadings in the suit mentioned.

The measure of damages is the estimated loss in the ordinary course of events arising from the breach of contract: where there is an available market for the goods in question, as apparently is the case here, the measure of damages is *prima facie* the difference between the contract price and the market or current price of the coal on the 28th of November 1907. If, as is said, there was no certain market rate, then evidence must be adduced for the purpose of showing what was the measure of damages.

The result then is that, in my opinion, the decree founded on Mr. Fletcher's judgment is correct, and this appeal should be dismissed with costs.

1910

KALLYANJEE SHAMJEE v. SHORROCK.

WOODROFFE J.

WOODROFFE J. I agree. To my mind the point seems to be quite clear. Had the plaintiff intended to sell by estimation only, it was open to him to state that fact. The word "say" may perhaps be a word of some ambiguity. It was, however, open to him to state that he sold the entire stock of "about" 700 or 800 tons, or "by estimate" 700 or 800 tons, or "approximately" 700 or 800 tons, using these or other words which would appropriately indicate a sale by estimation. But he sells in fact "the entire stock or 700-800 tons." And then we must look at the circumstances of the case that he was himself a coal dealer, that the goods were not, as in many of the cases cited to us, future goods. The goods were actually in existence at the date of the contract and at the depôt, and I think it must be assumed, in the absence of anything to the contrary, that the goods being in existence, the seller knew what the quantity was which he was selling. In my opinion, therefore, the words "700 or 800" tons were not, as has been contended, a mere collateral estimate of quantity, but an integral part of the contract, that is to say, they were words descriptive of the preceding words "entire stock." It is not likely, in the circumstances of this case, that a stock of existing goods would be sold or bought without a statement of the quantity of the stock sold.

Appeal dismissed.

J. C.

Attorneys for the appellant: *O. C. Gangooly & Co.*

Attorneys for the respondents: *Orr, Dignam & Co.*