

Gordhandas Nathalal Vs. Gorio Limited

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Court : Mumbai

Decided On : Jun-20-1933

Reported in : (1934)36BOMLR834

Judge : Kania, J.

Appeal No. : O.C.J. Suit No. 1794 of 1932

Appellant : Gordhandas Nathalal

Respondent : Gorio Limited

Judgement :

Kania, J.

1. The plaintiff filed this suit to recover from the defendants a sum of Rs. 12,000 and odd on the ground that the defendants failed to deliver the goods which the plaintiff had contracted to purchase from them. He alleges that he paid the customs duty and clearing and other charges to the defendants on the basis that the goods of which the shipping documents were tendered to him were of the contract quality. After these charges were paid it was found by the plaintiff that the goods were not of the contract quality. The defendants contend, inter alia, that they were not personally liable to the plaintiff as they were acting only as agents for an Italian firm as mentioned in para. 1; of their points of defence. It appears that thereafter the defendants applied for the issue of a commission to examine

certain witnesses to determine whether the defendants were only agents, or, in the alternative, that they were not liable to the plaintiff in the transactions as alleged in their points of defence. On February 17, 1933, Blackwell J., by consent, directed the following two issues to be tried as preliminary issues:

(1) Whether the defendants were acting as agents in respect of the contracts in suit? and

(2) whether the defendants are liable to be sued in respect of the contracts in suit and or are personally liable thereunder?

2. I have, therefore, to determine these two issues.

3. It appears that the plaintiff passed in favour of the defendants two documents, which are called indents, on February 20 and March 4, 1932, respectively. These indents are signed by the plaintiff and are addressed to ' Messrs. Gorio Ltd. Bombay, Karachi, Calcutta & Milano'. The material terms of these documents are the following:

We the undersigned do hereby agree to purchase from Messrs. Gorio Ltd. of Bombay the undermentioned goods shipped, being shipped, or to be shipped to Bombay by steamers on the conditions specified on the reverse.

4. This particular clause is translated into Gujarati and the Gujarati translation is printed immediately after the clause in English. Then follows a certain stipulation in the event of the indent being for marble tiles or slabs. The present litigation does not touch that clause at all. Thereafter certain description of the goods, the price, quality and the quantity, and the shipments are mentioned. The document is then signed by the plaintiff. On the reverse there are numerous conditions printed in small type. The first four conditions run as follows:

1. I/we hereby authorise you through your agents or your manufacturers to purchase^nd ship on my/our account and risk the whole or portion of the following goods at the prices specified. This indent is to remain in force for 4/6 weeks after its receipt at its destination. Your telegram accepting this order shall be subject to confirmation by letter as regards correctness of details. Any refusal by wire to

place the order at limits fixed may be set aside within three days should you be able to place the order meanwhile. If the limits given are subsequently increased or the indent is referred back for confirmation, the time for shipment shall be deemed to be increased by the number of days in which the delay is caused unless otherwise stipulated. For any bonus or allowance made by manufacturers I/we shall have no claim. Remarks made on samples on which the indents are based shall be taken as part of this indent. All risk of voyage, sea-damage, breakage and leakage will be on my/our head.

2. I/we agree to accept your invoice price of the purchase made as correct without further proof, and to accept on presentation and pay at maturity your bill or bills or your agent's draft or drafts or promissory notes drawn on me/us for the invoice value with all charges and interest through any bank 30 or 60 days after sight D/A or D/P. No objection or dispute shall be raised by me/us as to shipment, quality or damage, or otherwise unless the draft is first accepted and paid by me/us, agreeing that such disputes should be settled by arbitration as provided for below.

3. We agree to pay you or the bank the amount of the bill or bills, draft or drafts at the rate of exchange ruling on the date of payment. If we fail to pay the bill or bills, draft or drafts on or before the due date of payment we shall be liable to pay the same at the rate of exchange prevailing on the date on which we actually make the payment: you or the Bank however will be at liberty (without being obliged) at any time after the due date of payment and before actual payment by us, to fix the rate of exchange at the prevailing rate and on notice being given to us of the rate having been so fixed we agree to pay you or the Bank the amount of the bill or bills, draft or drafts at the rate of exchange so fixed.

4. Should we fail to pay at maturity or after maturity when called upon we hereby authorise you to sell the goods by public or private sale without any notice when and where you like and we bind ourselves to make good to you any loss or deficiency sustained through our default including all charges and interest, we waiving all claim to profit should there be any or sue us for payment of the full amount of the bill or bills, draft or drafts plus all charges.

5. Then follow certain conditions in respect of insurance. Condition 7 runs as follows:

7. For all orders for Japan goods I/we do not hold you responsible for slight variation in quality, shade, size, packing and shipment time whatsoever.' Then follow certain conditions in respect of perishable articles.

6. Condition 12 provides for arbitration and the material part runs as follows:

All the matters in difference between the parties relating to this indent or to the goods ordered herein shall be submitted to the arbitration of two merchants....

7. Then there follow several conditions about the variation in the time of shipment, and condition 24 authorises the defendants at any time to alter the D/A terms into D/P terms if they think fit without assigning reasons to the plaintiff. Condition 27 again refers to marble tiles and slabs and stipulates that the indentors will not hold ' you ' (defendants) responsible for breakage done in transit or in dock. Similarly, condition 28 absolves the defendants from liability in respect of the breakage when the defendants have to clear marble tiles and slabs from the dock to their godown.

8. On behalf of the defendants two indent reports (exhibit 1) sent by the defendants to the plaintiff on February 26 and March 6, 1932, are tendered. The printed portion thereof runs as follows:

Dear Sirs,

We have much pleasure in handing you below report (without engagement) on your valued indent by wire subject to confirmation by mail.

Yours faithfully,

Gorio & Co.

9. Below this is typed the indent numbers and the description of the goods. In the remark column it is stated : ' Accepted by cable subject to confirmation by mail'. It is admitted on both sides that except these two indent reports no other documents were sent by the defendants to the plaintiff or exchanged between the parties in

respect of the transactions in suit, till the shipping documents were received in Bombay.

10. The defendants have pleaded in para. 2 of their points of defence a certain course of conduct on their part to the knowledge of the plaintiff. Mr. Vachha, on behalf of the defendants, offered to lead evidence to substantiate those allegations. That was opposed on behalf of the plaintiff as the terms of the contracts between the parties were in writing. It was contended that the Court had to determine the two issues on a construction of the documents on record and the defendants were not entitled to put another construction on the documents in the light of any oral evidence suggesting a course of conduct between the defendants and their home friends, whose name even was never disclosed to the plaintiff at any stage. It is urged on behalf of the defendants that the indent forms are not clear but ambiguous, and although the opening part expressly states that the plaintiff agreed to purchase from ' Messrs. Gorio Ltd. Bombay ', that statement was qualified by the words ' on the conditions specified on the reverse '. It is pointed out that the very first condition on the reverse is against the construction sought to be put by the plaintiff on the terms of the indent, because that condition shows that the defendants were only agents and not vendors of the goods. Relying on condition (1) it is, therefore, urged that there is ambiguity in the terms of the documents, and, therefore, oral evidence is admissible.

11. In this connection my attention has been drawn to four cases of our High Court. *Mahomdally Ebrahim Pirkhan v. Schiller, Dosogne and Co.* I.L.R (1889) Bom. 470 was a reference from the Court of Small Causes. The point for the consideration of the Court was, whether, on the true construction of the indent in that case, the relations between the parties were that of a principal and agent, i.e., the indenter had employed the merchant merely to place an order with some other contracting party, or whether there was a direct privity of contract established for the sale and purchase of the goods between the indenter and the merchant in Bombay. The indent in that case opened with the following words:

I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terras stated below.

12. A few days after that indent was handed over to the merchant in Bombay, the latter informed the indenter that according to the instructions of the indenter the order was communicated to a Paris firm but the manufacturers could not undertake to execute the order at the price mentioned therein. Further negotiations, thereupon, took place through the Bombay merchant as a result whereof the price was increased, and in the letter increasing the price the indenter further mentioned that it was subject to a reply by wire within eight days. The acceptance of the indenter's order at the increased price was thereafter notified to him by the Bombay merchant by a letter which in terms stated that their home friends had reported by wire concerning the indenter's order that it was placed at the increased limit. When the letter confirming the wire was received by the Bombay merchant he further communicated to the indenter in the following terms:

Our Home firm informs us that the maker being full with orders could not deliver the goods in due time, and will ship only as soon as he possibly can. Please let us know whether you agree to the extension of time, or want to cancel the indent.

13. There arose subsequent correspondence between the parties, and, on the construction of the indent in that suit, the Court held that the indenter had appointed the Bombay merchant only 'to place' the order and it was a contract of agency and not of sale. Sargent C. J. in delivering the judgment observed as follows (p. 480):

But this indent is in form only a letter of instructions to the defendants to buy for the plaintiff, and in the letter of 4th August the defendants only inform the plaintiff that his instructions have been carried out by 'placing' his order, by which it must be understood that a contract of purchase had been entered into with some manufacturer of zinc.

14. In that case the following well-known passage from the judgment of Mr. Justice Blackburn in *Ireland v. Livingston* 1871 L.R. 5 H.L.C. 395 was quoted (p. 481):

It is quite true that the agent who in thus executing an order, ships goods to his principal, is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign

correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house, and the owner of that house.. And the legal effect of transaction between the commission merchant and the consignee who has given him the order, is a contract of sale passing the property from the one to the other;...

15. The terms of the indent in that case clearly indicate that the Bombay merchant was only employed as an agent and the relations of the parties were not that of a vendor and a purchaser.

16. In *Paul Beier v, Chhotalal Javerdas* L.R (1904) Bom. 1 : 6 Bom. L.R. 948 also there were no words of purchase as are found in the indents in the present suit. The first clause of the printed portion of the indent ran as follows:

We/I hereby request and authorise you to order, and if possible, buy and send us/me the undermentioned goods on our/my account and risk and we/I bind ourselves/myself to pay for the same at the prices and on conditions specified below.

17. There were other conditions about payment, what was to be done in the event of failure to take delivery of the goods, the right to sell, etc. When the goods arrived the defendants took delivery of a portion of the goods but refused to take delivery of the remainder, and contended that the plaintiffs were his commission agents for the purpose of purchasing goods in the European markets and were bound to furnish an account of the difference, if any, between the cost price of the goods and the price mentioned in the indent. At the hearing it was urged that, according to the custom of trade in Bombay, when a merchant requested or authorised a firm to order and to buy and send goods to him from Europe, at a fixed price, nett free godown, including duty, or free Bombay harbour, and no rate of remuneration was specifically mentioned, the firm was not bound to account for the price at which the goods were sold to the firm by the manufacturer. When the suit was first heard by Russell J., the learned Judge did not allow evidence of this custom to be led, and held, on the construction of the document, following

Mohomedally Ebrahim Pirkhan v. Schiller, Dosogne & Co., that the indent created a relationship as between a principal and agent, and, therefore, the Bombay merchant was bound to account on that footing. The matter went in appeal, and the learned Judges considered that the evidence of usage which was tendered ought to have been admitted, and remanded the case for the recording of that evidence. When that evidence was recorded and the matter came again before the Appeal Court, Jenkins C. J., in delivering the judgment of the Appeal Court, considered that it was not necessary to construe the indent and determine whether the relationship between the parties was that of a principal and agent or the transaction was one of sale and purchase. The Appeal Court held that it was satisfactorily established that the Bombay merchant was not bound to account for the difference according to the usage pleaded, and, therefore, disallowed the contention that the Bombay merchant was bound to account for the price at which the goods were ordered out from the manufacturers. In delivering the judgment Jenkins C. J. observed as follows (p. 18) :

It appears to me that the method of approaching the case, which these rival contentions invite, is unsatisfactory: each is based on too superficial a view of the position; the case is (in my opinion) not one to be decided by an attempt to bring the contract within the one or the other of the two categories of sale or agency; the provisions of the document are equivocal, some lean towards the one relation, some towards the other.

Therefore we must examine the document as a whole and in its several parts, and also the surrounding circumstances, for thus only (as it appears to me) can it be determined whether or not an obligation to account exists.

18. The learned Chief Justice thereafter examined in detail the evidence led by the parties, and in considering the evidence led by Messrs. Lyon & Co.'s dealings he pointed out very clearly that there were two distinct phases of the transaction, each marked by a separate document. First, there is the indent pure and simple and then the contract of sale between the firm and the dealer; so that the transaction begins with a request or authority, on the basis of which the firm enters on negotiations with the European house with a view to learning whether the

dealer's proposals are feasible, and when this is ascertained in the affirmative, the contract of sale is made. To put it in other words, in one case there is a pro forma indent (as is known in the Bombay market), in which case the dealings between the parties take substantially the following course. The indenter signs a document and hands it over to a Bombay merchant which contains merely a request and authority given to the Bombay merchant to make inquiries of different manufacturers or agents in Europe whether they could supply the goods mentioned in that document at the price and for the shipments mentioned therein. In pursuance of that document, and after the Bombay merchant has made the necessary inquiries, he conveys the result to the party who has placed the pro forma indent, and if the price is not agreed, further negotiations take place between the Bombay indenter and the manufacturers or agents in Europe through the medium of the Bombay merchant. When the terms are agreed, a regular indent is drawn up and signed by the indenter, which is the contract of sale. Jenkins C. J., in delivering the judgment, expressly stated that in the view the Court took of the matter it was not necessary, nor was it desirable for them to decide, whether on the acceptance of the indent the relations of the parties became crystallized into those of purchasers and vendors pure and simple, because apart from that the Court held that under the terms of the indent, viewed in the light of the custom of the Bombay market, the plaintiffs were not under any obligation to account for the difference to the defendants.

19. This point came to be considered by Macleod J, in two cases, viz., *Nazarali v. Malwa and Co* (1919) 23 Bom. L.R. 1108 and *N. Roy & Co. v. Surana, Dalai and Co.* (1919) 23 Bom. L.R. 1119. In the latter case the indent contained the following opening words:

I request you to order the whole or part of the undermentioned goods from your friends at Manchester on my account and risk.

20. Then followed several terms about delivery, and what was to be done in the event of the party failing to take delivery of the goods when received in Bombay. In the course of his judgment the learned Judge observed that when an importer buys on his own behalf as well as for his constituents it is necessary for him to

make it clear to his dealers what his liabilities are under his contracts with them. If he does not take this precaution, it cannot rest with him to decide afterwards, as the market fails or rises, whether he shall deliver goods bought on his own account or goods which he says he has bought against any particular indent. On the construction of the indent and consideration of the evidence the learned Judge came to the conclusion that the importer was bound to give delivery of the goods which arrived in pursuance of the order placed by him with the manufacturers after the indent was accepted by him. In *Nazarali Samsuddin v. Malwa & Co.* also the printed clause in the indent was:

I hereby request you to instruct your agents to purchase for me in Europe and Japan (if possible) the undermentioned goods on my account and risk upon the terms and limits stated below.

21. Thereafter the importer conveyed the offer to the manufacturers and the difference in price quoted and offered was ultimately settled after negotiations. When the goods arrived, the importing firm, who were drawees in case of need, cleared the goods and took delivery because the indenter failed to take up the goods after payment of the draft. Soon after the goods were so taken up by the importing house, the indenter tendered the price and all the expenses which were incurred by the importing house, and it was held that the importing merchant was bound to deliver the goods to the indenter because he was an agent to place the order, and until he had sold the goods on account of the indenter, he continued to hold the same as the agent and was bound to deliver them over to the indenter on payment of the price and the charges. In the opinion of the learned Judge there was a radical distinction between a contract made by a Bombay merchant with a firm of foreign commission agents to buy on his account and a contract made by a Bombay merchant with a Bombay importing firm to place his order in Europe.

22. In the unreported case of *J. Gorio v. Panduji Rowji* (1915) O.C.J. Appl No. 47 of 1914 also the terms of the indent were as follows:

I hereby request you to submit to your manufacturers or agents the following proposals for supplying me (if possible) the undermentioned goods on my account and risk upon the terms stated below.

23. That was a clear case of employment of an agent and the express terms used in the indent indicated that relationship.

24. In all the aforesaid cases it appears that no express words of 'purchase and sale' between the parties were used. The express terms clearly conveyed the sense of agency and the subsequent conditions 'were looked at to see whether there was a personal obligation on the parties to supply the goods in spite of the opening words indicating agency. In the present case, however, the position is quite the contrary. The document on the face of it expressly provides that the plaintiff had purchased the goods mentioned on the face of the document from ' Messrs. Gorio Ltd. Bombay '. The words ' shipped, being shipped or to be shipped ' also indicate clearly that before the document was handed over by the plaintiff to the defendants it would have been perfectly legitimate for the defendants to have purchased the goods or to have ordered them out. These words materially distinguish the indent in this suit from the other. indents which I have discussed above. The words ' on the conditions specified on the reverse ', in my opinion, only mean that the express contract of purchase contained on the face of the document was subject to the conditions printed on the reverse in so far as they were applicable to the contract between the parties. In this connection it is important to note that the printed conditions include conditions applicable only to perishable articles, marble tiles and slabs, and goods imported from Japan.. It must be conceded that those conditions cannot apply and have nothing to do with the transactions in suit. If so, I do not think there is any difficulty in holding that some other conditions also do not apply to the transactions of purchase contained in the document. Strong reliance is placed on behalf of the defendants on condition No. 1. It should be noted that that condition again is not a request from the plaintiff to the defend-dants to place an order but only mentions that the defendants were authorised either through their agents or manufacturers to purchase and ship on account of the plaintiff the goods mentioned in the order. The terms contained in that condition like the conditions relating to marble tiles, etc., are not applicable at all to the present case. It appears that the defendants have got only one form of printed conditions in respect of their dealings, and it is evident that out of the same only some apply to each individual transaction. Condition No. 1 appears to be applicable only in the event of a pro forma indent being submitted, and as that

event has not happened in the present case, condition No. 1 does not apply to the transactions of purchase in this suit. The fact that the transactions are contracts for sale and purchase is further strengthened by the words used in conditions Nos. 2, 3 and 4. Under condition No. 2 the plaintiff was bound to accept the invoice of the defendants and the defendants were themselves entitled to draw a bill on the plaintiff, and if that was done, the plaintiff was bound to honour and pay the draft. Under condition No. 3 the plaintiff undertook the obligation to pay to the defendants themselves or to the bank (which must mean the bank named by the defendants) the amount of the bill or draft, and in the event of his failing to do so, certain rights were given to the defendants. Under condition No. 4 the plaintiff had undertaken to make good to the defendants any loss or deficiency sustained through the default of the plaintiff in carrying out the terms of the contract, viz., the contract of purchase, and the defendants were also given a right to sue for the payment of the full amount of the bills and all charges. As regards the arbitration clause, again, it may be noted that the word ' parties' used in that definition could only mean the parties to that document, viz., the plaintiff and the defendants. It is common ground that no third party's name was disclosed at any time in this transaction till the shipping documents arrived. This clause would be, therefore, binding between the plaintiff and the defendants in respect of the purchase transaction of the goods mentioned on the face of the document. Looking to the whole contract it appears to me clear that the relations between the parties were that of a principal and principal, and according to the clear and unambiguous terms used on the face of the documents, the plaintiff agreed to purchase from the defendants the goods mentioned therein. The conditions of payment, delivery, and the mode of carrying out the same, contained in the printed conditions, were applicable to the transactions of sale and purchase mentioned on the face of the documents.

25. The two indent reports (exhibit 1) do not help the defendants. If the contract was of purchase merely by sending those two documents, the defendants could not alter the legal relations between the parties. By those documents the defendants have only conveyed to the plaintiff that the indents were accepted subject to confirmation by mail. It is significant that in neither of these two documents (exhibit 1) the name of the firm. from whom the defendants had

purchased the goods is disclosed. Indeed, one is left to conjecture altogether as to whether the goods were purchased by the defendants from manufacturers in England, Japan, America, or any other place. Under these circumstances, I do not think the defendants' liability is in any way affected by their sending these two documents to the plaintiff.

26. As, in my opinion, the terms of the contract are contained in the two indents, exhibit A, and the only other documents, which have been exchanged between the parties in connection with the transactions and the arrival of the goods, are exhibit 1, I do not think any oral evidence, which is not in the nature of usage or custom of trade but is only the evidence of what the defendants did after they accepted the documents, (exhibit A) from the plaintiff, is material or relevant for determining the legal relations between the parties. Exhibit A is in no way equivocal, and, I am unable to hold that it is necessary for the Court, in determining the legal relations between the parties, to look at the conduct of the defendants in the present case. On the face of the documents it is clear that the transactions were of sale and purchase, and, as I have pointed out, all the conditions not being applicable to every transaction mentioned on the face of the document, it is perfectly legitimate to read such conditions only, out of those printed on the reverse, as are applicable to the transaction noted on the face of the document, and to construe the document in that light. In any event I am not prepared, under the circumstances of the present case, and having regard to the language of the indents, to allow the defendants to supplement the evidence in the way suggested by them by the issue of a commission.

27. Viewing the transactions from another point of view, I think that, even if the transactions be not pure transactions of sale and purchase, it is evident that the defendants acted as the agents of some undisclosed foreign principals in the transactions and, under the terms of the contracts, including the conditions on the reverse, undertook to carry out those transactions on behalf of their undisclosed foreign principals. In that light exhibit 1 also does not help the defendants. Indeed the wording of exhibit 1 supports the contention that the defendants were agents of undisclosed foreign principals and entered into the transactions as such. In that view of the case also the defendants are liable to the plaintiff to carry out the

transactions of purchase and are liable to be sued by the plaintiff.

28. The defendants to pay the costs of the trial of these issues.

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