

Muhammad Habib-ullah Vs. Muhammad Shafi

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Court : Allahabad

Decided On : Jan-08-1919

Reported in : (1919)ILR61All324

Judge : Muhammad Rafiq and ;Lindsay, JJ.

Appellant : Muhammad Habib-ullah

Respondent : Muhammad Shafi

Judgement :

Muhammad Rafiq and Lindsay, JJ.

1. The parties to this appeal entered into a contract on the 8th of January, 1914. The contract was for a supply of sleepers to the plaintiff appellant, Sheikh Habib-ullah. According to the terms of the contract the defendant respondent, Muhammad Shafi, was to supply the plaintiff with 8,000 sleepers of a particular description. It was agreed that the sleepers should be stocked for delivery at two stations on the Bengal and North-Western Railway, and under the 4th clause of the contract note it was provided that the plaintiff should have the sleepers examined and passed by the end of April, 1914. After the contract note had been drawn up, Habib-ullah advanced the sum of Rs. 5,660 to the defendant by way of earnest money. Under the 8th clause of the contract note, it was agreed that if, within the time fixed for the completion of the contract, the plaintiff have any cause of dissatisfaction with the defendant, the latter was to be liable to refund the

earnest money and pay damages. Two suits arising out of the contract embodied in this note were filed by the parties. We are dealing here in appeal with the suit in which Habib-ullah was the plaintiff. According to the case set out in the plaint the defendant was guilty of breach of the contract by failing to deliver sleepers at the places appointed, within the period fixed by the agreement. It was alleged in the fourth paragraph of the plaint that the defendant had failed to supply even a solitary sleeper. For this reason, therefore, Habib-ullah brought a suit to recover Rs. 9,660. Out of this Rs. 5,660 represents the money which he had advanced to the defendant. The balance Rs. 4,000 was claimed by way of damages for breach of the contract.

2. The counter-suit which was brought by the defendant Muhammad Shafi was for recovery of the balance of the purchase-money. According to the case set up by him, he had fulfilled the contract into which he had entered and had supplied the goods to Habib-ullah as agreed upon. His case rested upon the allegation that the contract had been completed and the property in goods had passed to Habib-ullah. He gave credit for the amount of the earnest money received, that is to say, Rs. 5, 660, and claimed Rs. 3,539, as the balance of the money, which was owing to him.

3. Both suits were tried together, but separate decrees were prepared, and the result of the trial was that the suit brought by Muhammad Shafi against Habib-ullah was dismissed. According to the learned Subordinate Judge's opinion the contract had not been fulfilled, the property in goods had not passed to Habib-ullah and therefore, Muhammad Shafi was not entitled to claim the sum he was asking for as the balance of the price of the goods. An appeal against this decree was taken to the court of the District Judge of Agra and was dismissed. So far, therefore, as the suit which was brought by Muhammad Shafi against Habib-ullah is concerned, it has been disposed of for good and all.

4. Turning now to the suit which was brought by Habib-ullah we find that on the pleadings five issues were framed, three of which related to the other suit filed by Muhammad Shafi. The result of the trial of the present suit has been that the Subordinate Judge has found that Habib-ullah, the plaintiff, was guilty of breach of

the contract. Notwithstanding this finding, he was given a decree for the refund of the earnest money less a sum of Rs. 2,265-10-0 on account of damages to which he thought Muhammad Shafi was entitled by reason of the breach.

5. In the course of the argument it was complained by the learned Counsel for the appellant that the case had not been properly tried in the court below and certainly there are some grounds for criticizing the manner in which the case was handled by the Subordinate Judge. He tells in his judgment that both parties took up a very obstinate attitude. They were represented by pleaders whom he describes, perhaps facetiously, as 'able pleaders.' There seems to have been considerable wrangling between these pleaders regarding the incidence of the burden of proof and the Subordinate Judge seems to have been quite overcome by the situation and to have been unable to exercise any control over the proceedings before him.

6. We think, under the circumstances which are shown, that the Subordinate Judge would have been well advised to express an opinion on the legal question as to which party was liable to support the burden of proof. It is evident from his judgment that he was aware of the law on the subject and indeed he has expressed it quite correctly in his judgment. The plaintiff Habib-ullah came into court asking for damages for breach of the contract and there can be no doubt whatever that the burden of proving a breach of the contract lay upon him.

7. However, whatever faults may be attributed to the learned Judge in connection with these proceedings we are not prepared to listen to the argument that a fresh trial should be ordered in the interests of the plaintiff. We have the fact that he was represented by counsel, and we have also the fact that he and his pleaders stubbornly refused to produce any evidence other than certain evidence which had been previously taken upon commission. The plaintiff asserted that the burden of proof lay upon the defendant, and he refused obstinately to give any other evidence. If a plaintiff takes up this attitude, and if it subsequently turns out that it was a mistaken attitude, he has only got to thank himself or the pleaders who were advising him. We decline to pass any order referring this case again for a fresh trial.

8. There is evidence on the record consisting, as we have said, of statements which were taken on commission, of two witnesses who were examined on behalf of the plaintiff and three on behalf of the defendant. On the materials before him, the learned Subordinate Judge came to the conclusion that the breach of the contract was due to the omission of the plaintiff to carry out his part of the agreement. The learned Subordinate Judge refers in particular to the statements of two witnesses, Chaudhri Afzal Rahman and Bashir-ud-din. On their statements he holds as a matter of fact that 8,000 sleepers had been collected by the defendant at the appointed places before the end of April, 1914. He further finds that the plaintiff had failed to have the sleepers inspected and passed by the engineer whom he was employing for that purpose.

9. If this finding of fact can be supported, it seems to us that the appellant here is not entitled to succeed in his appeal and therefore we must hold that the cross-objections which have been filed on behalf of the defendant respondent must prevail. So far as the finding is concerned we agree with the court below. An objection has been taken to the evidence of these witnesses, which was recorded by a commissioner. It is said that the evidence was not recorded in the manner prescribed under the rules contained in orders XVIII and XXVI of the Code of Civil Procedure. The record of the evidence is in English and it is contended that there is nothing to show that the evidence having been given in Urdu, the English record was translated to the witnesses and admitted by them as correct. So far as this point is concerned, we have no hesitation in over-ruling the argument for it is clear that no objection on this score was taken to the evidence when it was tendered in the court below, nor is the omission of a certificate to the effect that the evidence was translated to the witnesses any proof that the law has not been complied with. There is no rule that such a certificate must be attached to the record, and we are entitled to resort to the ordinary presumption that everything has been done in due order. We agree with the court below that there is no reason to discredit the statements of these two witnesses, and, they being accepted, it necessarily follows that Habib-ullah was guilty of the breach of the contract. It is hardly necessary to observe that a plaintiff who himself is guilty of breach of the contract cannot sue for damages arising out of his own default. Consequently in no circumstances is it possible for Habib-ullah to maintain the claim for Rs. 4,000

damages.

10. There remains the question whether or not he was entitled to a refund of the earnest money amounting to Rs. 5,660. We have already mentioned that the Subordinate Judge has found that he was entitled to this refund less a certain sum deducted on account of damages claimable by the defendant respondent.

11. The law, however, is not as laid down by the Subordinate Judge. Our attention has been called to two cases in this Court, namely, Bishan Chand v. Radha Kishan Das (1897) I.L.R., 19 All., 489 and Roshan Lall v. The Delhi Cloth and General Mills Company, Limited (1910) I.L.R., 33 All., 166. The third case is a case of the Madras High Court--The Vellore Taluk Board v. Gopalasami Naidu (1914) I.L.R., 38 Mad., 801. The law as settled appears to be that where a plaintiff has advanced money by way of earnest and as a guarantee for the fulfillment of the contract, he cannot recover the earnest money where it is found that the breach of the contract is due to his own default. That being the law, it seems to us that the proper order for the Judge to pass in this case was to dismiss the claim of Habib-ullah entirely. What we have said disposes of the various grounds of appeal which are to be found in the memorandum of the appellant and also determines the cross-objections which have been filed on behalf of the respondent. We think the plea which is contained in the first paragraph of the petition of cross-objections must prevail and we allow these cross-objections accordingly. The result is that the appeal fails and is dismissed with costs. We allow the cross-objections and award costs in favour of the respondent against the appellant.