

Price Vs. Browne

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Court : Chennai

Decided On : Apr-30-1891

Reported in : (1891)ILR14Mad420

Judge : Muttusami Ayyar and ;Parker, JJ.

Appellant : Price

Respondent : Browne

Judgement :

1. The facts of the case are as follows: the plaintiff hired from the defendant at Ootacamund a pair of carriage horses for six months from the 1st of April 1890. On May 6th the horses were driven to Wellington and back. On May 7th the defendant took away the horses from the plaintiff's stables, on the ground that the plaintiff had broken the conditions of the contract of hiring by driving the horses beyond local and Municipal limits. The plaintiff denies that there was any such condition in the contract and sues for damages on account of the trouble and expense caused to him by the defendant taking away the horses.

2. The Subordinate Judge found that it was not proved that the plaintiff had any express notice of the condition set up by the defendant at the time the contract was made, and also that the drive to Wellington and back was not under the circumstances an unreasonable distance to take the defendant's horses; but he held that the defendant had established by evidence a valid trade custom as

prevailing at Ootacamund by which it was generally understood that horses hired by the day or month could not be used beyond the local and Municipal limits of the station, and that this condition was impliedly imported into the contract between the plaintiff and the defendant. On this ground he dismissed plaintiff's claim for damages and awarded to the defendant Rs. 25-13-4 as due to him by the plaintiff for having taken the horses to Wellington.

3. The points before us are (1) Whether there is legal evidence of a valid custom? And (2) whether, if so, the contract is affected by the custom?

4. On the facts as found by the Subordinate Judge, the defence must fail unless the special custom is established. Now, to quote the words of Jessel, M.R., in *Nelson v. Dahl* L.R. 12 Ch. D. 568, the existence of a special custom is a question of fact and the custom must be strictly proved. It must be so notorious that every body in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable and it must have quite as much certainty as the written contract itself. In *Kirchner v. Venus* 12 M. P. C 361, the Privy Council observed that when evidence of the usage of a particular place is admitted to add to or in any manner affect the construction of a written contract, it is admitted on the ground that the parties who made the contract are both cognizant of the usage and must be presumed to have made their agreement with reference to it, and no such presumption can arise when one of the parties is ignorant of the usage. We may take it therefore as well established and settled law that the legal requisites of a valid custom are, first, that it should be certain; secondly, that it should be invariable; thirdly, that it should be reasonable; and lastly, that the circumstances of the case must be such as to render it fair and reasonable to presume that the party, whom it is sought to affect by the custom, had knowledge of it as affecting the particular agreement made by him and that he made the agreement with reference to it.

5. Applying these principles to the present case, we find that the evidence adduced to establish the alleged custom or usage of trade in Ootacamund consists of the testimony of other Livery Stablekeepers (in addition to the defendant himself, his wife and son) and of only two gentlemen who have been

long residents in the station. The defendant stated that the hiring was always local and added that customers, as a rule, knew his rules, but admitted he had to tell some. His wife considered that the difference between town' hiring and ' journey' hiring was well understood. Another witness, Murray, had lived 22 or 23 years in Ootacamund, and 20 years ago had been managing proprietor of a Carrying Company. Speaking of the usage as to the local hiring, he admitted that it is more honored in the breach than in the observance, thus showing that the usage was not invariable. Two other Livery Stable-keepers were called, Clarke and Bernard. The former stated that horses hired for local use should be used in the station, but admitted that if any one hired for six months, he would let him know that the horses should only be used locally, thus making it a special condition in a long contract. The other witness stated he never mentioned the condition about local limits to his customers as he thought the rule was well understood.

6. The only two residents examined, Messrs. Schmidt and Begbie, spoke to a general understanding that horses should be only used in Municipal limits, but it is evident that these gentlemen spoke merely of daily hiring. The first admitted he had never hired for a fixed period and the latter asserted that there were no fixed Municipal limits, adding that he should not consider it unreasonable with a good pair of horses to take them to Wellington and back if they had good rest and food.

7. This is all the evidence in support of the defendant's case. On the other hand witnesses were called to prove that persons in Ootacamund were in the habit of taking their horses to Wellington and back in the course of the same day, and that it was generally understood that persons who hired horses by the month might use them within any reasonable distance and were not confined to the limits of the Municipality.

8. The Subordinate Judge has, however, found that the use was not unreasonable provided the use was not excluded by the custom. As to this we are constrained to hold that the evidence adduced by the defendant does not establish the conditions we have enumerated above, and which are the legal requisites of a valid and binding custom. The alleged custom is not shown to be either certain or invariable. The restriction is not found to be reasonable when applied to this particular class

of contracts of hiring for a specific number of months; nor is it shown to be so notorious that all persons so hiring can be held to enter into the contract with knowledge and notice of the custom.

9. We may further observe that even if the evidence had established a local custom as to hiring by the day or month, it is by no means clear that the contract in this particular case could be held to have been made with reference to such custom. The general rule of law is that where the term to be implied from the usage of trade is either inconsistent with or expressly excluded by the contract it cannot be implied. The defendant's wife stated in her evidence that the agreement was for six months certain that, contrary to the usual practice, the horses were not to come back at night to the livery stables, but were to be kept by the hirer who promised to look after them as her own. It is evident that such an arrangement must give the hirer a very full control over the horses, and if the promise to ' treat them as her own ' implies reasonable use as well as physical care, the plaintiff will be entitled to as full a reasonable use as he would have over his own horses, and the Subordinate Judge has found that the use was not unreasonable.

10. We must therefore set aside the decree and remand the suit for a determination of the second issue as to the amount of compensation to which the plaintiff is entitled. The petitioner is entitled to his costs in this Court and the costs of the Subordinate Court will abide and follow the result.

11. Barclay, Morgan and Orr, Attorneys for Petitioner.

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