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Court : Kolkata

Decided On : Feb-13-1912

Reported in : (1912)ILR39Cal568

Judge : Lawrence H. Jenkins, K.C.I.E. C.J. and; Woodroffe, JJ.

Appellant : Angullia and Co.

Respondent : Sassoon and Co.

Judgement :

Lawrence H. Jenkins, K.C.I.E. C.J.

1. This litigation has been occasioned by the alleged breach of a contract for the sale of sugar. The terms of the contract are set forth in the bought note.
2. This document is dated the 28th of February 1910, and is signed by M.C. Misry on behalf of the defendant's firm.
3. By it the defendant's firm purports to buy from the plaintiffs 750 tons of white cane Java sugar, the shipments to be made during August, September, October, November, December equally. The price was Rs. 7-14-9 per bazar maund ex jetty or docks. Delivery was to be taken by the buyer ex jetty or dock within three days, and it was expressly provided as follows:

The goods to be at the buyers' risk and peril from the time of landing of the sugar until they be removed from jetty, dock, ghat or godown, and should the buyers fail to take delivery of the sugar, the sellers will have the option of re-selling the same in the open market by private sale or by public auction and hold the buyers responsible for all consequences.

4. On the 14th September the plaintiffs wrote to the defendant's firm in reference to 150 tons of sugar on board S.S. Okara, being the August shipment under the contract, and gave notice of the expected arrival of the steamer on or about that day. The steamer arrived on the 15th, and on the 6th of October delivery was taken of 25 tons under the contract, but beyond this no delivery was taken.

5. On the 8th of November the plaintiffs sold the balance of 125 tons, and it is their case that this was done in exercise of the power of re-sale vested in them by the contract. On this footing they demanded from the defendant's firm a sum of Rs. 2,341-14-9 as representing the difference between the contract price and the amount realized on the re-sale, and further sums for interest and charges, which brought the whole of their demand up to Rs. 2,745-12-6.

6. The claim was resisted by the defendant's firm, and so this suit was brought.

7. The case came for trial before Harington J., and; the three following issues were raised: (i) whether the suit lies under Order XXX, (ii) whether the manager, Misry, had authority, and (iii) whether there could be no re-sale of unascertained goods. The learned Judge decided the first and second issues in the plaintiffs favour, and the third against them. He, however, directed an enquiry as to damages.

8. From this decree the defendant firm has appealed. The objection of want of jurisdiction embodied in the first issue has been abandoned and the points made before us are these:

First, it is said that the contract was unauthorized, and, secondly, that as the Judge decided against the plaintiff's contention that the price on the re-sale furnished the measure of damages, he should have dismissed the suit and not directed a reference.

9. For the defendant it has been contended that the Judge was in error in deciding adversely to his contention as to the re-sale, and though no cross-appeal or cross-objections have been filed, it is urged that Order XLI, Rule 33, empowers the Court to give effect to defendant's contention as to the re-sale.

10. First, I will deal with the defendant's contention that the contract was unauthorized.

11. I do not propose to deal with this at length, for I am in complete agreement with Harington J. on this point.

12. True it is that the contract was signed not by the defendant but by Misry, his agent; but Misry was acting under a power of attorney which authorized him to direct, to superintend, manage li and control and carry on in Calcutta in the name of M.S.E. Angullia & Co. the business of general merchants and then carried on by the defendant in Singapore and elsewhere. For that purpose the widest powers were vested in Misry, followed no doubt by the qualification that nothing therein contained should be deemed to 'authorize the attorney to speculate in gunnies, opium, shares or exchange.'

13. It is urged that the transaction in suit was a speculation and so in contravention of the power-of-attorney. But even if it was a speculation--and this is a view that has not been established--it is outside the terms of the express prohibition on speculation. But then it is said the transaction is not in accord with the manner in which business was carried on by the defendant at Singapore, and in this connection the defendant complains that a commission for his examination should have been issued, as this would have enabled him to prove this point.

14. In my opinion there is no force in this contention, and I am confirmed in this view by the fact that at the hearing the request for a commission was not advanced.

15. And I think there was very good reason for this. The words 'as now carried on by me in Singapore and elsewhere' are merely descriptive of the general character of the business, and were not intended to limit the articles in which business was

to be done or to define the terms on which it was to be conducted.

16. It is not suggested that the agent could not purchase sugar, or that a forward contract could not be made the objection when analysed is as to the prudence of the transaction, and its mere imprudence would not render it unauthorized.

17. Then it is contended that as the plaintiffs' claim to damages as formulated in the plaint and the issues rest on the re-sale, the Court should not have directed a reference as to damages on a totally different basis. I think this contention is entitled to great weight, and all the more in view of the fact that the plaintiffs, when challenged by the defendant, refused to amend their plaint so as to make a case of damages on the difference between the contract price and the market price at due date, and was supported in this refusal by the Court.

18. And there is yet another circumstance which lends strength to the defendant's contention. The due date under the contract is the 21st September, and there is no evidence of damage on that date on the contrary, the evidence, such as it is, points the other way. To evade this difficulty it is suggested that the due date was postponed, and, in fact, the learned Judge treats the 20th October as the day of breach.

19. But postponement was not pleaded, nor was it made the subject of an issue. Nor does the matter rest there; for Mr. Sinha, when challenged, could not point to any agreement, or clear indication, that the due date should be postponed; all he could contend was that it might be inferred from the fact that late delivery was taken of 25 tons.

20. In my opinion it would be wrong in view of the case made by pleadings and issues, and of the mode in which the plaintiffs' case was conducted, to hold that there was a postponement of the due date or to direct a reference as to ' damages.

21. But then the plaintiffs claim that they were entitled to have the damages estimated on the footing of the re-sale. Harington J. decided this against the plaintiffs, holding there was nothing to which the power of re-sale under the

contract could attach. For the plaintiffs it was contended that the learned Judge in so deciding failed to follow the decision of the Full Bench in *Moll Schutte & Co. v. Luchmi Chand* (1898) I.L.R. 25 Calc. 505.

22. But when the essential facts of that case and the present are contrasted, they present a significant difference.

23. In *Moll Schutte & Co. v. Luchmi Chand* (1898) I.L.R. 25 Calc. 505 the plaintiffs sold to the defendants under an indent contract ten cases of tobacco to be shipped by steamer to Calcutta. The plaintiffs ordered ten cases only of tobacco, and caused them to be shipped and consigned to themselves for the purpose of fulfilling this contract. The goods duly arrived, but the defendants refused to pay for and take delivery of the goods on the ground that they were not the goods contracted for. The goods were tendered to the defendants, and were in accordance with the contract. Now to use the phraseology of the Contract Act, the goods had been appropriated, but possibly not ascertained. I say 'possibly not ascertained,' because it seems to have been thought by the Full Bench that the property in the goods had not passed (see Section 83). The position then was that, the vendors had done all in their power to make the specific goods the subject-matter of the contract.

24. In this case it is otherwise; here there was, neither ascertainment nor even appropriation. The sugar was in bulk, and the vendors had not even appropriated the goods for the purposes of the agreement, and that condition of affairs continued until after the re-sale.

25. Can it be then said that there even were goods to which the power of re-sale applied so as to make the result of that re-sale the measure of damages?

26. The answer to this depends on the construction of the agreement between the parties as did the decision in *Moll Schutte & Co. v. Luchmi Chand* (1898) I.L.R. 25 Calc. 505 turn on the construction of the agreement there under consideration.

27. Neither in that case nor in this was any general principle or rule of law involved. What then is the scope of this power of re-sale the words of which I have

already read? The goods would have come within its operation if they had been ascertained, or even if they had been appropriated for the purpose of the agreement. But in my opinion it would be going beyond the true meaning of the words to extend the operation of the clause to goods which had not even been appropriated, and thus had in no sense become the subject-matter of the contract.

28. I do not say that a clause could not have been so framed as to have this extended operation: there would be nothing illegal in it. But I do hold that the clause, as it has actually been framed, cannot have this operation.

29. This is the view taken by Harington J., and he, too, arrived at this conclusion by the same process of reasoning. I think he used the word 'ascertained' not in the technical sense in which it is employed in the Contract Act, but, in the sense of 'appropriated,' for I feel very sure the learned Judge had no intention of disregarding the Full Bench decision.

30. The result then is that, while I agree with the view of the learned Judge as to the scope of Misry's authority and the interpretation of the power of re-sale, I think, for reasons I have already stated, that a reference as to damages should not have been granted as this was opposed to the plaintiffs' own case.

31. The appeal must therefore be allowed and the suit dismissed with costs throughout.

Woodroffe J.

32. I agree.