Harrison Vs. Fortlage

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Court : US Supreme Court

Decided On : Mar-02-1896

Appeal No. : 161 U.S. 57

Appellant : Harrison

Respondent : Fortlage

Judgement :

Harrison v. Fortlage - 161 U.S. 57 (1896)
U.S. Supreme Court Harrison v. Fortlage, 161 U.S. 57 (1896)

Harrison v. Fortlage

No. 14

Argued November 13, 1894

Decided March 2, 1896

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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLLABUS

A contract for the sale of goods "shipping or to be shipped during this month from the Philippines to Philadelphia, per steamer *Empress of India* " at a certain price " *ex* ship," "sea-damaged, if any, to be takes at a fair allowance; no arrival, no sale," and providing that if, by any unforeseen accident, she is unable to load and no other steamer can be procured within the month, the contract is to be void, does not require the goods to be carried to their destination by the vessel named, and is satisfied if the goods are put on board of her at the Philippines at the time specified, and, upon her being so injured on the voyage by perils of the sea as to be unable to carry them on, are forwarded by her master by another steamer to Philadelphia.

This was an action of assumpsit, brought April 22, 1890, in the Circuit Court of the United States for the Eastern District of Pennsylvania, by Hermann Fortlage and others, aliens, partners under the name of A. Tesdorpf & Co., against Charles C. Harrison and others, citizens of Pennsylvania, partners under the name of Harrison, Frazier & Co., upon a contract in writing for the purchase of 2,500 tons of sugar. The facts admitted or proved at the trial were as follows:

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The plaintiffs' agent signed, and the defendants accepted, a contract in writing in the following terms:

"New York, June 22, 1889"

"Messrs. Harrison, Frazier & Co., Philadelphia."

"Dear Sirs: I have this day sold you, for account of Mess. A. Tesdorpf & Co., of London, about 2,500 tons superior Iloilo sugars, usual assortment (1/8 No. 1, 1/4 No. 2, and 5/8 No. 3), shipping or to be shipped during this month from the Philippines to Philadelphia, per steamer *Empress of India* at 5 5/8 c. per pound *ex* ship, net landed weights, two percent tare, cash, less 2 1/3 percent in ten days

from average date of discharge."

"Sea-damaged, if any, to be taken at a fair allowance."

"No arrival, no sale."

"Should the steamer, through any unforeseen circumstance, such as accidents of the seas, stress of weather, etc., be unable to load these sugars within the time specified, and the sellers cannot secure other steam tonnage to load in June, this contract is to be void."

The words " *ex* ship," as used in this contract, were understood in the trade to mean that the buyer receives the goods at the tackle of the ship, the seller paying the freight and the duty, and the buyer paying all charges of landing after the goods leave the ship's tackle.

The plaintiffs were merchants, and the defendants, as the plaintiffs knew, were refiners of sugar, and bought this sugar for use in their regular business.

The sugar was shipped at the Philippine Islands, in bags, in the amount, quality, and assortment, and within the time, specified in the contract, on the steamer *Empress of India,* which was then seaworthy and fit in every particular for her voyage, and which sailed for Philadelphia via the Suez Canal, June 23, 1889. The usual length of the voyage was three months, unless prolonged by accident or by perils of the sea.

On August 21, 1889, the *Empress of India,* while at anchor at Port Said, was, without her fault, run into by another steamer and so much damaged as to be obliged to land her

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cargo, and to go to Alexandria to be repaired. After being repaired and reloading her cargo, she sailed from Port Said, November 30, 1889, and in crossing the Atlantic met with extraordinarily rough weather, and was forced to put into Bermuda, January 5, 1890, and there, upon the recommendation of surveyors,

and in order to enable her to proceed on her voyage with safety, discharged 700 tons of the sugar.

On February 11, 1890, she arrived at Philadelphia, with the remaining 1,800 tons of the sugar on board. The 700 tons were forwarded from Bermuda by another steamer, which arrived at Philadelphia, March 3, 1890.

The plaintiffs tendered all the sugar to the defendants, and they refused to receive any of it, upon the sole ground that the contract required the sugar to be brought to Philadelphia in the *Empress of India,* and therefore the plaintiffs had not performed the contract.

The sugar was sold, by agreement of the parties, and for whom it might concern, for less than the contract price, and it was admitted that if the plaintiffs were entitled to recover at all, the measure of damages was the sum of $63,098, the difference between the contract price and the proceeds of the sale.

The circuit court instructed the jury that the plaintiffs were not required by the contract to do more than they had done, and that the defendants were not warranted in declining to receive the sugar, and the jury, by direction of the court, returned a verdict for the plaintiffs for the sum claimed and interest, upon which judgment was rendered. The defendants excepted to the instruction and direction of the court, and sued out this writ of error.

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MR. JUSTICE GRAY, after stating the case, delivered the opinion of the Court.

The single question is whether the contract between the parties required all the sugar to be brought to Philadelphia in the *Empress of India,* upon which it was originally shipped. This depends upon the meaning of the terms of the writing, in which the parties must be assumed to have embodied and expressed their whole intention and to have defined all the conditions of the contract. The court is not at liberty either to disregard words used by the parties descriptive of the subject matter or of any material incident or to insert words which the parties have not

made use of. *Norrington v. Wright,* 115 U. S. 188 ; *Filley v. Pope,* 115 U. S. 213 ; *Watts v. Camors,* 115 U. S. 353 ; *Cleveland Rolling Mill v. Rhodes,* 121 U. S. 255 ; *Seitz v. Brewers' Refrigerating Co.,* 141 U. S. 510 ; *Bowes v. Shand,* 2 App.Cas. 455; *Welsh v. Gossler,* 89 N.Y. 540; *Cunningham v. Judson,* 100 N.Y. 179; *Iasigi v. Rosenstein,* 141 N.Y. 414.

This contract was made in June, 1889, for the sale of sugar, described as "shipping or to be shipped during this month from the Philippines to Philadelphia, per steamer *Empress of India.* " A contract "to ship by" a certain vessel for a particular voyage ordinarily means simply "to put on board," not including the subsequent carriage, and there is nothing in this contract to show that a different meaning was in the contemplation of the parties.

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The words " *ex* ship" are not restricted to any particular ship, and by the usage of merchants, as shown in this case, simply denote that the property in the goods shall pass to the buyer upon their leaving the ship's tackle, and that he shall be liable for all subsequent charge of landing. They do not constitute a condition of the contract, but are inserted for the benefit of the seller. *See Neill v. Whitworth,* 18 C.B. (N.S.) 435, and L.R. 1 C.P. 684.

The clause "Sea damaged, if any, to be taken at a fair allowance" contemplates the risk of damage to the goods by perils of the sea, and does not restrict to any particular ship the subsequent transportation of such goods to their destination.

In the clause, "no arrival, no sale," the word "arrival" evidently refers, as the word "sale" must necessarily refer, to the goods which are the subject of the contract, and not to the particular vessel on which they are shipped, and the whole effect of the clause is that if the goods never arrive at their destination, the buyers acquire no property in them and do not become liable to the sellers for the price.

The remaining clause, which provides that if the *Empress of India,* by unforeseen accident, is unable to load in June, and the sellers cannot secure another steamer

during that month, the contract is to be void, touches the matter of loading only. The contract fixes no limitation of time in any other respect.

The contract nowhere requires that the sugar shall arrive at Philadelphia by the *Empress of India,* and essentially differs in this respect from the cases, cited at the bar, of contracts for the sale of goods "to arrive" by, or "on the arrival" of, a ship named, as in *Lovatt v. Hamilton,* 5 M. & W. 639; *Johnson v. Macdonald,* 9 M. & W. 600, and *Hale v. Rawson,* 4 C.B. (N.S.) 85. A particular ship being designated as to the putting on board only, and not as to the arrival, it is not to be inferred that the goods must be carried to their destination in the same ship.

The sugar in question having been put on board the *Empress of India,* and the conditions of the contract thus satisfied so far as that ship was concerned, the subsequent transportation and delivery of the goods were to be governed by the

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general rules of the maritime law. By that law, as understood in England, the master, from the necessity of the case, had the right, and, by our law, the duty, in case of disaster to his ship, to transship the goods and send them on by another vessel, if one could be had. *The Maggie Hammond,* 9 Wall. 435, 76 U. S. 458 ; 3 Kent Com. 212.

In the able argument for the plaintiffs in error it was admitted that the rule that the master, in case of necessity, is the agent of all concerned applied to the seller, who was the owner, and to the insurer, and to anyone having an insurable interest in the goods, but it was contended that the plaintiffs in error, before the arrival of the goods, had no insurable interest therein, and *Stockdale v. Dunlop,* 6 M. & W. 224, was relied on as decisive of this. But that case was decided upon the single ground that there the contract for the sale of goods was oral, and therefore incapable of being enforced. It is well settled that any person has an insurable interest in property by the existence of which he will gain an advantage or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself. In the present case, the plaintiffs in

error, under a valid contract in writing, had an insurable interest by reason of the title which would accrue to them upon arrival and delivery and of the injury which they might suffer by a previous loss of the goods. *Insurance Co. v. Chase,* 5 Wall. 509, 72 U. S. 513 ; *Filley v. Pope,* 115 U. S. 213 , 115 U. S. 220 ; *Wilson v. Jones,* L.R. 2 Exch. 131, 151; 3 Kent Com. 276.

Judgment affirmed.