Moore Vs. United States

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Appeal No. : 196 U.S. 157

Appellant : Moore

Respondent : United States

Judgement :

Moore v. United States - 196 U.S. 157 (1905)
U.S. Supreme Court Moore v. United States, 196 U.S. 157 (1905)

Moore v. United States

No. 71

Argued December 6, 1904

Decided January 3, 1905

196 U.S. 157

APPEAL FROM THE COURT OF CLAIMS

SYLLABUS

Usage may be resorted to in order to make definite what is uncertain, clear up what is doubtful, or annex incidents, but not to vary or contradict the terms of a contract.

Under contracts between a San Francisco coal dealer and the United States for the delivery of coal at Honolulu "at wharf" or "on wharf as customary," the customs referred to held to be those of Honolulu and not of San

Page 196 U. S. 158

Francisco, and that the United States, in the absence of any provision to the contrary, could not be held liable for the demurrage paid by the shipper to the owners of vessels carrying the coal for delay in discharging their cargoes on account of the crowded condition of the harbor.

In engagements to furnish goods to a certain amount the quantity specified governs. Words like "about" and "more or less" are only for the purpose of providing against accidental and not material variations.

Under the contract in this case for delivery of "about" 5,000 tons of coal the United States cannot refuse to accept more than 4,634 tons, but is liable for the difference in value on 366 tons tendered and acceptance refused.

The facts are stated in the opinion.

Page 196 U. S. 162

MR. JUSTICE Mc KENNA delivered the opinion of the Court.

The appellant is a general commission merchant and shipper at San Francisco. He filed his petition in the Court of Claims, consisting of two paragraphs, in the first of which he claimed reimbursement from the United States of the sum of $1,053.36, demurrage paid by him for the detention over lay days of two ships chartered by him to transport coals to Honolulu, and there to be delivered to the United States. By the second paragraph, he prayed the recovery of the sum of

$1,120.87, the

Page 196 U. S. 163

difference between the contract price of 366 tons of coal, which the United States refused to receive, and the price obtained for the same upon the sale in open market.

The causes of action rested on two contracts entered into by appellant with the United States through the proper officer of the Quartermaster's Department, United States Army, by which appellant agreed to furnish and deliver to that department Honolulu, Hawaiian Islands, " *at the wharf,* " about 3,900 tons of the best merchantable "Wallsend" Australian steam coal at the rate of not less than 100 tons a day at 2,240 pounds to the ton, dangers of the sea and any causes beyond appellant's control excepted, the deliveries to commence on the arrival of the Hawaiian ship *Euterpe* at Honolulu, on or about July 23, 1898, for and in consideration of which appellant was to be paid at the office of the Quartermaster, United States Army at San Francisco, California at the rate of $9 per ton, in gold coin of the United States.

And by the second contract, appellant was to deliver "on wharf, as customary," about 5,000 tons of the best merchantable Australian, Seaham, Wallsend, or Pacific Cooperative steam coal, deliveries to commence at Honolulu on or about October 1, 1898. The other facts were found by the Court of Claims as follows:

"III. That, at the respective times these contracts were made, it was the custom at San Francisco between shippers and shipowners to insert in their charter parties a stipulation to the effect that cargoes were to be discharged as customary, in such customary berth or place as consignee shall direct, ship being always afloat, and at an average specified number of tons per weather working days (Sundays and holidays excepted), to commence when ship is ready to discharge, and notice thereof has been given by the captain in writing, and, if detained over and above the said laying days, demurrage to be at 4d. register ton per day, which stipulation was duly inserted in the contract of the claimant with the ships employed by him to transport the coal mentioned in the contracts. It does not appear

Page 196 U. S. 164

that the officers and agents of the defendant who were authorized to make, and did make, the contracts for the defendant, had knowledge or notice of such custom, nor that the contracts, or either of them, were made in view of such custom."

"IV. The claimant [appellant] discharged his said contracts as follows: the first contract: by the arrival at Honolulu of the ship *Euterpe* with 1,543 tons of coal, July 31, 1898, which was placed in berth at the wharf by the harbor master of said port August 8, 1898 at 2.15 P.M. and commenced discharging coal at 3 P.M. same day, and finished August 29, 1898, consuming eighteen working days. If she had been discharged at not less than 100 tons per day, the time consumed would have been sixteen days. It does not appear that the defendant was at fault either in the loss of time in arriving at the wharf, nor in the discharge of the cargo afterwards. The court finds the defendant was able, ready, and willing to receive the cargo as rapidly as discharged at the wharf. The claimant paid to the shipowner $1,053.36 demurrage for these delays."

"The second contract:"

"1. By the arrival of the bark *Harvester* with 2,179 tons of coal, August 28, 1898, at Honolulu, which was placed at a berth at the wharf by the harbor master September 16, 1898, and began discharging coal on that date, and completed same October 7, 1898, a period of eighteen working days. It does not appear that the defendant was at fault in the loss of time of said last-mentioned ship in arriving at the wharf."

"2. By the arrival of the ship *General Gordon* at Honolulu, August 27, 1898, with 2,455 tons of coal. While at anchor, September 9, 10, and 11, 330 tons were discharged into steamship *Arizona,* a transport of defendant, for its own use, after which the *Gordon* was placed at a berth at the wharf by the harbor master, September 14 at 1 P.M., and then commenced the further discharge of the cargo, completing the same October 4, no delays having occurred at the wharf. It does not appear the defendant was at fault in the ship's delay in reaching the wharf. In the case of each ship, the defendants had notice in writing of their respective arrivals

Page 196 U. S. 165

within twenty-four hours thereafter. The wharves at Honolulu are under the control of a harbor master. The practice of such harbor master was to assign ships to berths at the wharves in the order of their respective arrivals, and this practice was followed by him in respect to the ships mentioned. Claimant paid said shipowners for delays $1,433.12 to the *Harvester* and $744.48 to the *General Gordon.* All coal delivered was paid for by defendant."

"V. The coal actually delivered under the second contract was 4,634 tons, completed October 7, 1898. About a month subsequent to this, claimant purchased 366 tons of coal of the barkentine *Omega,* then in the Honolulu harbor, and tendered the same to the defendant upon its contract of June 23, 1898, but the defendant refused to receive it, whereupon claimant sold the same in market, for the best price he could obtain at $3.06 1/4 per ton less than $9, the contract price with the defendant, equivalent to $1,120.87 in all, and to his loss in that amount."

"VI. At the time of the delivery of the coal mentioned in the foregoing findings, the Honolulu harbor had eleven docks or wharves, three of which only were used for the discharge of coal. The docks were crowded, and several vessels were moored at the reef. By local regulations of the government, a harbor master had general supervision of all vessels in the harbor, and all vessels were anchored and assigned to berths, in the order of their arrival, by the harbor master. There were no lighters for public use, and defendant had none at the port, and it was usual or customary to discharge freight upon the wharves. The defendant had no authority over the wharves, and was subject to local regulations and the order of the harbor master, the same as individuals."

As a conclusion of law, the court decided that appellant was not entitled to recover. 38 Ct.Cl. 590.

The question in the case is whether the delay at Honolulu in the delivery of the coal was caused by the United States or by appellant -- or, in other words, whether it was the duty of

the United States to designate and furnish a wharf for the discharge of the coal from the ships, or its duty only to receive the coal at the wharf when delivered there by appellant.

The question is one of law. Any fault in fact upon the part of the United States is excluded by the findings of the court. The cause of delay is expressly found to have been due to the conditions in Honolulu harbor, and that to these conditions the United States was as subordinate and subject as appellant. The liability of the United States is asserted nevertheless on account of the custom existing in San Francisco between shippers and shipowners.

But the terms of the contracts are explicitly opposite to the custom. The custom requires a consignee to designate a berth for the discharge of cargo, and is hence responsible, it is contended, for the delays to a ship in reaching the berth, though caused by the conditions existing at the port of discharge. The contracts have no such provision, nor do they refer to the charter parties entered into between claimant and the ships. The contracts require delivery to be "at wharf" (first contract); "on wharf as customary" (second contract). "As customary" meant the mode of discharging freight at Honolulu. Culver, Carriage by Sea, 696. The custom there was to discharge freight upon the wharves. The terms of the contracts, therefore, are reinforced by the custom at Honolulu, and the custom at San Francisco cannot prevail against them.

The effect of usage upon the contracts of parties has been decided many times. It may be resorted to in order to make definite what is uncertain, clear up what is doubtful, or annex incidents, but not to vary or contradict the terms of a contract.

Various applications of this principle are presented in the following cases: *Barnard v. Kellogg,* 10 Wall. 383; *Heame v. Marine Ins. Co.,* 20 Wall. 488; *Insurance Companies v. Wright,* 1 Wall. 456; *Oelricks v. Ford,* 23 How. 49; *Hostetter v. Park,* 137 U. S. 30 ; *National Bank v. Burkhardt,* 100 U. S. 686 . We do not think it is necessary to make a detailed review of these cases or of the cases which appellant has cited in which

Page 196 U. S. 167

consignees have been charged with demurrage. To trace and relate the various conditions upon which consignees have been held liable would extend this opinion to too great length, and discuss matters irrelevant to the case as we regard it. In all of the cases cited, there was an omission of duty on the part of the consignees. In the case at bar, there was no omission of duty, and, besides, the United States was not a consignee of the coal in any proper sense of that word. There was no privity between it and the ships. Its contract was to receive coal at the wharf, and pay for it on delivery there, after inspection. Its contract was not to receive coal in lighters, or to bear any expense in the transportation to the wharves. It is manifest that coal on board ships in a harbor is not in the same situation as coal on a wharf. The wharf, under the contract, was the place of destination, and the appellant took the chances, as observed by the Court of Claims, of obstacles which should intervene to delay the delivery of the coal at the wharf, as they did of other obstacles which might have intervened to prevent the coal reaching the harbor. It was not strictly the coal in the ships that the United States contracted to take. It was certain quantities of coal, and on account of this, in the exercise of their rights under the second contract, appellant bought coal in the open market and tendered it in fulfillment of that contract. The liability of the United States to accept we shall presently consider. We cite the fact now as illustrating the meaning of the contract. It is manifest, from these views, the Court of Claims was right in holding the United States was not liable for the delay caused to the ships by the conditions which existed in Honolulu harbor.

2. By the terms of the second contract (June 23, 1898), the appellant agreed to deliver and the United States agreed to "receive about 5,000 tons" of coal, delivery

to commence with about 2,200 tons, to arrive at Honolulu on or about the first day of October, 1898. By the seventh of October, delivery was made of 4,634 tons. About a month subsequently, appellant purchased 366 tons of coal of a ship then in the harbor,

Page 196 U. S. 168

and tendered the coal to the United States in fulfillment of the contract to deliver 5,000 tons. The United States refused to receive it, and appellant sold it in the open market for $3.06 1/4 per ton less than $9, the contract price. This was the best price which could be obtained, and the loss to appellant was $1,120.87. The Court of Claims held that the appellant was not entitled to recover. We think this was error. The obligations of parties were reciprocal -- one to deliver, the other to receive, about 5,000 tons of coal, and equally reciprocal is the liability for nonperformance of the obligations. The only question can be, is 366 tons less than 5,000 tons, "about 5,000 tons?" We think not. The difference is too great. We said in *Brawley v. United States,* 96 U. S. 168 , 96 U. S. 172 , that in engagements to furnish goods to a certain amount the quantity specified is material and governs the contract.

"The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight."

See also Cabot v. Winsor, 1 Allen, 546, 550; *Salmon v. Boykin,* 66 Md. 541; *Indianapolis Cabinet Co. v. Herrman,* 7 Ind.App. 462; *Cross v. Eglin,* 2 Barn. & Adol. 106; *Morris v. Levison,* 1 C.P.D. 155, 158; *Bourne v. Seymour,* 16 C.B. 337, 353; *Simpson v. N.Y., N.H. & H.R. R. Co.,* 38 N.Y.S. 341, 342.

The record does not inform us why the United States refused the tender, and we must assume that it had no other justification than its supposed right under the contract.

Judgment reversed, and cause remanded with directions to enter judgment for appellant (claimant) in the sum of $1,120.87.

MR. JUSTICE HOLMES concurs in the result.