China Cotton Exporters vs Beharilal Ramcharan Cottonmills Ltd on 17 February, 1961

Equivalent citations: 1961 AIR 1295, 1961 SCR (3) 845, AIR 1961 SUPREME COURT 1295, 1961 3 SCR 845 1963 BOM LR 962, 1963 BOM LR 962

Author: K.C. Das Gupta

Bench: K.C. Das Gupta, P.B. Gajendragadkar

PETITIONER:
CHINA COTTON EXPORTERS

Vs.

RESPONDENT:
BEHARILAL RAMCHARAN COTTONMILLS LTD.

DATE OF JUDGMENT:
17/02/1961

BENCH:
GUPTA, K.C. DAS
BENCH:
GUPTA, K.C. DAS
GAJENDRAGADKAR, P.B.

CITATION:
1961 AIR 1295 1961 SCR (3) 845

ACT:
Breach of Contract-Contract for sale of goods-Supply subject to import licence-Shipping date guaranteed-Failure to supply Inadequacy of seller's contract with overseas suppliers-Liability.

HEADNOTE:
The appellant had made a contract with its Italian suppliers for 200,000 lbs. of cotton fibre for August, 1950, shipment and another for 300,000 lbs. for Novermber/December, 950, shipment. On July 22, 1950, the appellant entered into a contract with the respondent for the sale Of 40,000 lbs. of fibre, August shipment. On August 9, 950, it entered into another contract with the respondent for sale of 50,000 lbs. of fibre, "I October/November 1950 shipment ". In the remarks column of the second contract it was mentioned: "

This contract is subject to import licence and therefore the shipment date is not guranteed ". In October, 1950, 50,000 lbs. out of the first contract with the Italian suppliers arrived; Out Of this 40,000 was delivered to the respon-, dent against his first contract and 10,000 against the second The balance Of 40,000, lbs. against the second contract was not
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supplied. The respondent filed a suit for damages for breach of contract. The appellant contended that it was not liable as. the date of shipment was not guaranteed and as it had adequate contracts with its suppliers to cover the contract with the respondent but was unable to fulfil it as the supplier failed to make the deliveries.
Held, that the appellant was liable for breach of contract as the date of shipment was guaranteed and as the appellant had no adequate contracts with its suppliers to cover the contract with the respondent. In commercial contracts time is ordinarily of the essence of the contract. The words in the remarks column meant that the date of shipment was not guaranteed only to the extent that delay in obtaining the import licence stood in the way of keeping to the shipment date. As there was no delay in obtaining the licence the shipment date October/November, 1950, was guaranteed. The other terms of the contract also showed that the date of shipment was guaranteed. The appellant had to show that on the date of the breach i.e. on December 15, 1950, it had a contract under which it could, provided the contract was not broken, obtain the goods to honour its agreement to sell October/November shipment of goods. The first contract with the suppliers was cancelled at the end of September and the appellant was not entitled to receive any goods under it on the relevant date. Under the second contract it could not be said that the suppliers were bound to deliver the goods by instalments or to supply at least 40,000 lbs. before December 15, as the contract with the suppliers was not produced before the Court. The appellant had failed to establish that it had an adequate contract to cover the contract in suit. It was not enough for the appellant to show that there was a chance of it fulfilling its contract with the respondent.
Bilasiram Thakurdas v. Gubbay (1915) I.L.R. 43 Cal. 305 and Phoenix Mills Ltd. v. Madhavdas Rupchand (1916) 24 Bow. L.R. 142, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 331 of 1956. Appeal by special leave from the judgment and decree dated March 11, 1955, of the Bombay High Court in Appeal No. 97 of 1954.

M. C. Setalvad, Attorney-General for India and G. C. Mathur, for the appellants.

Purshottam Trikumdas, S. N. Andley, J. B. Dadachanji and Rameshwar Nath, for the respondents.

1961. February; 17. The Judgment of the Court was delivered by DAS GUPTA J.-This appeal is from a judgment of the Court of Appeal of the Bombay High Court confirming the decision of a single judge of that Court in a suit for damages for breach of a contract of sale. By a contract in writing dated August 9,1950, entered into at Bombay, the appellants who carry on business at Bombay as import and export merchants agreed to sell to the respondent, a company carrying on business also at Bombay as a Cotton Spinning and Weaving Mill, and the respondent agreed to purchase 50,000 lbs. of Italian Staple Fibre Cotton of the quality mentioned therein, at Rs. 1,350/- per Candy Ex docks, Shipment October/November 1950. Of this quantity 10,000 lbs. was delivered to and accepted by the respondent company on October 31, 1950. The balance amount of 40,000 lbs. not having been delivered in terms of the contract the respondent company brought the present suit for damages on the allegation that the appellant firm had wrongfully failed and neglected to deliver this balance amount of the contract goods. The appellant admitted failure to deliver this amount; but -pleaded that this was not wrongful failure to deliver. The appellant averred in its written statement that the non-supply of the goods arose by reason of the "

> intermediary parties (meaning thereby the suppliers) failing to supply and deliver goods to the defendant and also of the circumstances beyond their control"; and claimed that it was exempted from any liability to the plaintiff company under printed term 16 of the contract. The defendant ,further pleaded that the shipment time mentioned in the contract was not guaranteed, and the time of shipment was not of the essence of the contract. The Trial Judge held that the shipment time was guaranteed, except in so far as;delay in shipment might be due to delay in obtaining import licence- which however was in the present case obtained in good time- ; that time of. shipment was of the essence of the contract; and finally that there was no case here of any "

intermediary parties " failing to supply or -deliver the goods and as the defendant firm had not made any adequate contract which would have enabled it to obtain the supply of goods-if such contract had not been broken-from which it could have delivered those 40,000 lbs. ;the further defence that the non-supply was due to " circumstances beyond their control " also failed. Accordingly the Trial Judge held that there had been wrongful breach of the contract by the appellant firm and the plaintiff company-the respondent-was entitled to damages. The actual assessment of damages was referred to the Commissioner.

On appeal by the defendant, the Appeal Court held agreeing with the Trial Judge that as there was no delay in obtaining the import licence, the obligation to deliver to the plaintiff contract goods of October/ November shipment continued. The learned judges also pointed out that " the failure to give delivery primarily arose because the defendants never were ready and willing to carry out their obligation to give delivery because they had made no arrangement to get goods from Italy which they could have delivered at the contract time." Therefore, the Court of Appeal held that it was not

open to defendant to rely on any of the clauses in the contract which condones delay on their part or which excuses them from giving delivery. The appeal was accordingly dismissed.

It is against this order of dismissal that the present appeal has been preferred by the defendant firm after having obtained special leave from this Court.

Three contentions were raised before us in support of the appeal. The first contention is that the shipment date was not guaranteed; the second contention, which really is involved in the first,, is that the shipment time was not of the essence of the contract. Lastly, it was urged that the contracts which the defendant firm had made with its:

> Italian suppliers, were adequate for their obtaining supplies in good time to enable, them-if these contracts were not broken to complete the requisite delivery to the plaintiff company, in proper time.
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> The contract wag on a printed document, with the teems regarding quantity,: quality, price, shipment, payment, and the remarks column. filled in manuscript.
>
> Against Shipment-we find " October/November, 1950. " In the remarks column we find the following written: " 1. Invoice weight to be accepted ; 2. This contract is subject to import licence and therefore the shipment date is not guaranteed."
>
> We find thus that whatever may have been said earlier in the printed portion of the contract the parties took care, after specifying " October/November, 1950 " as the date of shipment to make a definite condition in the remarks column, on the important question whether the shipment date was being guaranteed or not and if so, to what extent. The words are: "This contract is subject to import licence, and therefore the shipment date is not guaranteed." Remembering, as we must, that in commercial contracts, time is ordinarily of the essence of the contract and giving the word "
>
> therefore " its natural, grammatical meaning, we must hold that what the parties intended was that to the extent that delay in shipment stands in the way, of keeping to the ship- ment date October/November, 1950, this shipment date was not guaranteed; but with this exception shipment October/November, 1950, was guaranteed. It has been strenuously contended by the learned Attorney-General, that the parties were mentioning only one of the many reasons which might cause delay in shipment and the conjunction "

therefore " was used only to show the connection between one of the many reasons-by way of illustration and a general agreement that the shipment date was not guaranteed. We do not consider this explanation of the use of " therefore "

> acceptable. If the parties intended that quite &part from delay in obtaining import licence, shipment date was not guaranteed, the natural way of expressing such intention-an intention contrary to the usual intention in commercial contracts of treating time as the essence of the contract- would be to say: ,,This contract is subject to import licence and the shipment date is not guaranteed. " There might be other ways of expressing the same intention, but it is only reasonable to expect that anybody following the ordinary rules of grammar would not use " therefore"

in such a context except to mean that only to the extent that delay was due to delay in obtaining import licence shipment time was not guaranteed.

As we have already mentioned, the remarks column was filled in manuscript and consequently even if the terms in print by themselves might have justified a conclusion that the parties intended that the shipment date was not guaranteed, the intention expressed in the manuscript should prevail. We are not satisfied however that the terms in print would justify any such conclusion. The learned Attorney-General tried to persuade us that the printed term 2 was inconsistent with shipment date being guaranteed at all. The term 2 is in two parts. The first part provides that subject to provisions of cls. 7 and 9, ,if the goods or any portion of them are not shipped for any reason, or reasons other than those specified in el. 9, within the shipment time with the fifteen days latitude provided for in the said clause 7, the sellers shall not be responsible but shall give notice to the buyers of such non-shipment and the buyers shall have option to cancel the portion so overdue without claiming any allowance or compensation or grant such extension of time for shipment from time to time as may be required by the sellers " at allowance as mentioned in the second paragraph. The second paragraph of term 2 lays down graduated rates of allowance for different periods of delay:

> at 2 1/2 % for delay up to a month; at 2-1/2% for delay from one month to two months; 3-1/2% for delay of two to three months and 7-1/2% for delay of more than three months. Different rates were mentioned as regards the woollen goods. It may be mentioned here that cl. 7 of the contract provides for a latitude of 16 days after the shipment while cl. 9 contains the special exemption clause where shipment is delayed by force majeure, war or warlike operations, strikes, lock-outs, etc. The learned Attorney-General contends that provisions of term 2 show that the parties agreed that the time will not be, of the essence of the contract and shipment time will not.be guaranteed. It appears to us that these provisions show just the contrary. The provisions in the first paragraph give the seller a right to give notice to the buyer of non-shipment and give the buyer an option on such notice either to cancel the portion not shipped or to grant extension of time at allowances mentioned in the second paragraph. Unless time was of the essence of the contract and shipment time was Ramces guaranteed there would be no need for making such provisions for an option for extension of time, or for these allowances.
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> The provisions of cls. 7 and 9 do not affect the question. We are therefore of opinion that the courts below were right in thinking that the shipment time was guaranteed, and time was of the essence of the contract.

This brings us to the question whether the defendant firm had any adequate contract with their Italian suppliers which if not broken would have put them in a position to supply the good,-, in question. It is not disputed that if there was any such adequate contract the defendant will not be liable for damages. It is equally clear that if there was no such contract, the defendant cannot escape liability. The learned Attorney-General sought to argue that even if the contract was such that there was a chance of the defendant obtaining the supplies in good time that would be sufficient to exonerate it. We think that this proposition is not sound. Before the seller could be heard to say that the non-supply was due to default on the part of his suppliers or some other cause beyond his control the seller is bound to show that be himself did all in his power to ensure timely supply. He could do so by showing that he had made a contract under which he was entitled to obtain the supplies in good time. If under his contract with his own suppliers he was not so entitled but there was merely a chance of his getting the supplies in time to enable him to honour his contract the non-supply would clearly be due to his own default in not making a contract which would have so entitled him and not to a default on the part of the supplier or to a circumstance beyond his control.

Turning now to the facts of the case we find that the defendant had made two contracts with its Italian suppliers- one contract for 200,000 lbs. of cotton for August, 1950, shipment which it is said was later extended to September, 1950; another contract Of August 4, 1950, for 300,000 lbs. for November/ December, 1950. The defendant had also a contract with the plaintiff company of July 22, 1950, for sale of 40,000 lbs. August shipment-later converted to November/December shipment. In October, 1950, 50,000 lbs. out of the first contract with the Italian suppliers arrived; out of this 40,000 was delivered to the plaintiff company in satisfaction of the earlier contract and 10,000 was delivered in satisfaction of this second contract-the contract now in suit. Under the contract for 300,000 lbs. the buyer (the defendant) received 70,000 lbs. of goods. Of this nothing was given to the plaintiff company and so 40,000 lbs. remained undelivered. The question is had the defend. ant a contract under which it could, provided the contract was not broken, obtain the goods in time to honour its agreement to sell October/November shipment of goods. The learned Attorney-General complains that the courts below totally left out of consideration the sellers' (the appellants') earlier contract with Italian suppliers and says that that, at least, was an adequate contract. There would be force in this argument if at the time the breach took place, that is, the last date under which shipment could be made under the con. tract in suit, the defendant would have been entitled to obtain goods, under that earlier contract. But that is not the position. In any case the earlier contract was cancelled at the end of September; so that at the. time of the breach the seller was not entitled to receive any goods under that contract.

We come next to the seller's November/December shipment contract with its Italian suppliers. The courts below have pointed out that under such a contract, the Italian suppliers were entitled to delay shipment till the last day of December. If that be the

position the seller would not, on the last day by which the goods under its contract ought to have been supplied, viz., December 15, 1950, after adding 15 days under clause 7, have any contract under which it would have been entitled to receive goods in sufficient time. The learned Attorney- General has however contended that under the contract which the defend-' ant had with its Italian suppliers the Italian suppliers would be bound to spread the supply over the period, November/December and thus bound to ship 40,000 lbs. at least well before the December, 15.

The great difficulty in the way of this argument is that the defendants' contract with its Italian suppliers has not been produced and we do not know the terms of that contract. In Bilasiram Thakurdas v. Gubbay (1) from which the learned counsel sought assistance the terms of shipment in the contract was " shipments to be made by steamers during July- December 1914 -shipment in any month by one or more steamers This was clearly an instalment contract and on the construction of that contract the court held that the buyer had the right to demand delivery of goods by separate shipments spread over the months from July to December. In Phoenix Mills Ltd. v. Madhavdas Rupchand (2) the question arose whether the plaintiff's sellers had committed a breach by not giving delivery where the terms of delivery were: "

200 bales No. 20s and 20-1/2s Ring October-November 1913 and 50 bales No. 6-1/2s Mule yarn as manufactured ". It was further mentioned in the contract that the buyers agreed to take delivery of the bales from time to time as they are ready. It was in view of these terms that Mr. Justice Macleod held that " the Court can only consider the parties to have in-tended, when they signed that contract, that delivery should be asked for and given during October- November of two hundred bales, delivery being asked for of reasonable quantities at a time during the period of delivery."

These decisions are in line with the English law in this matter as stated by Benjamin on Sale, 8th Edition, at P. 724 thus :-

" Where the amount of instalments is not specified, the prima facie rule would seem to be that the (1) (1915) I.L.R. 43 Cal. 305.

(2) (1916) 24 Bom. L.R. 142.

deliveries should be rateably distributed over the contract period."

The learned author goes on to say that " if it can be gathered from the terms of the contract or the circumstances that rateable deliveries were not intended, it then becomes a question for the jury whether the tender of or demand for, delivery is a reasonable one."

Quite clearly however the question whether delivery should be spread over the period arises only in case of instalment contracts. There is nothing however before us to show that the defendant's

contract with its Italian suppliers was an instalment contract. Even though the proprietor of the defendant's Italian supplier was examined he said nothing which would even tend to show that the contract between him and the defendant was an instalment contract. In the absence of the contract or any other circumstances justifying a conclusion that it was instalment contract it is not possible to accept the contention of the learned Attorney-General that the defendant's Italian suppliers would be bound to spread the supply over the period October/November, 1950.

There is thus no escape from the conclusion that the defendant has failed to establish its case that it had an adequate contract with its Italian suppliers, which if not broken, would put it in possession of 40,000 lbs. of cotton fibre before December 15, 1950. The defendant firm cannot therefore escape the liability for the damages for breach of the contract, by the failure to supply those goods. The appeal is accordingly dismissed with costs.

Appeal dismissed.