

Privy Council Appeal No. 70 of 1914.

A. K. A. S. Jamal - - - - - Appellant,

v.

Moolla Dawood Sons and Company - - Respondents.

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 3RD NOVEMBER 1915.

Present at the Hearing :

VISCOUNT HALDANE.

SIR JOHN EDGE.

LORD WRENBURY.

MR. AMEER ALI.

[*Delivered by* LORD WRENBURY.]

Under six contracts made at various dates between April and August 1911 the plaintiff (the appellant) was seller to the defendants of certain 23,500 shares at prices amounting in the aggregate to Rs. 184,125. 10. The date for delivery was the 30th December 1911. The contract notes contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction, and any loss arising should be recoverable from the buyer. In some cases the words ran: "by auction at the Exchange at the next meeting," &c.

By the 30th December the shares had fallen largely in value. On that day the vendor tendered the shares and asked payment of the price, adding: "Failing compliance with this request by to-day our client will be forced to

“ sell the said shares by public auction on or
 “ about the 2nd proximo, responsible for all
 “ losses sustained thereby.” The purchasers
 did not pay the sum demanded. They set up a
 contention that the seller was indebted to them
 on another transaction, and they sent cheques
 for the differential sum of Rs. 75,925. 10, and
 called for a transfer of the shares. On the
 2nd January 1912 the seller repudiated the
 claim to a set-off, and repeated : “ We have now
 “ to give you notice that our client intends to
 “ resell these shares and to institute a suit
 “ against you for the recovery of any loss which
 “ may result from that course.” The purchasers
 stopped payment of the cheques, and nothing
 turns upon the fact that they were given.

(sic.)

Negotiations ensued between the parties which
 extended to 26th February 1912. On that day
 the seller, by his agents, wrote to the purchasers
 a letter as follows :—

“ 71, Phayre Street, Rangoon,
 “ 26th February 1912.

“ Messrs. Moolla Dawood and Sons.

“ Dear Sirs,

“ We are instructed by Mr. A. K. A. S. Jamal that
 “ he has not hitherto taken any steps to enforce his claim
 “ against you for failing to pay for and take delivery of
 “ 23,500 shares in the British Burma Petroleum Company,
 “ Limited, at your request, in order that his claim might,
 “ if possible, be settled. It now appears that no active
 “ steps are being taken to settle the matter but that much
 “ time is being lost. Our client will therefore now pro-
 “ ceed to enforce his rights by suit unless the sum of
 “ Rs. 1,09,219. 6 is paid to him by way of compensation
 “ before the end of this week.

“ The amount claimed is arrived at by deducting
 “ Rs. 74,906. 4, the value of 23,500 shares at 4s. 3d., from
 “ Rs. 1,84,125. 10, the agreed price of the shares.

“ Yours faithfully,
 “ GILES AND COLTMAN.”

The 4s. 3d. a share there mentioned was the
 market price of the shares on the 30th December.

On the 22nd March the seller commenced a suit to recover Rs. 1,09,218. 12 as damages for breach measured by the difference between the contract price of the shares and their market price (4s. 3*d.* a share) on the date of the breach, the 30th December 1911. This is (with a trifling variance) the same sum and arrived at in the same way as the Rs. 1,09,219. 6 mentioned in the letter.

Immediately after the letter of the 26th February 1912, viz., on the 28th February, the seller commenced to make sale of the shares. He sold them all at various dates from the 28th February onwards. In one case the sale was at less than 4s. 3*d.* (viz., at 4s.). In one case it was at 4s. 3*d.* In every other case it was at a higher price.

The decision under appeal is one which gives the purchaser the benefit of the increased prices which the shares realised, by giving him credit in reduction of the damages for the increased prices in fact realised over the market price at the 30th December, the date of the breach. The appellant contends that this is wrong.

Their Lordships will first deal with the contractual term as to resale. Upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages, and the stipulation in question was in their Lordships' opinion only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. If the seller availed himself of that option he was not selling the purchaser's shares with a consequential obligation to account to him for the price but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the

purchaser not completing at the contract price. Their Lordships are unable to agree with the original Judge that the plaintiff's letters of the 30th December and 2nd January amounted to an election to take a measure of damages to be arrived at by a resale. Moreover, there never was any sale by auction under the option. Nothing turns upon this provision as to resale.

The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach*. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it.

Staniforth v. Lyall, 7 Bing, 169, is an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him, does not entitle the defendant to the benefit of the latter contract. *Yates v. Whyte*, 4 Bing, N.C. 272; *Bradburn v. Great Western Railway*, L.R. 10, Ex. 1; *Jebsen v. East and West India Dock*, L.R. 10, C.P. 300.

The decision in *Rodocanachi v. Milburn*, 18 Q.B.D. 67, that market value at the date of the breach is the decisive element, was upheld in the House of Lords in *Williams v. Agius*, 1914, A.C. 510. The breach in *Rodocanachi v. Milburn* was breach by the seller to deliver, but in their Lordships' opinion the proposition is equally true where the breach is committed by the buyer.

The respondents further contend that Sections 73 and 107 of the Indian Contract Act, or one of them, is in their favour. As regards Section 107 their Lordships are unable to see that it has any application in the present case. It deals with cases in which a seller has a lien on goods or has stopped them in transitu. The section follows upon sections dealing with those subject matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares.

As regards Section 73 it is but declaratory of the right to damages which has been discussed in the course of this judgment.

Their Lordships find that upon the appeal the officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller's loss

at the date of the breach was and remained the difference between contract price and market price at that date. When the buyer committed this breach the seller remained entitled to the shares, and became entitled to damages such as the law allows. The first of these two properties, viz., the shares, he kept for a time and subsequently sold them in a rising market. His pocket received benefit, but his loss at the date of the breach remained unaffected.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the orders in the original court and in the Appeal Court discharged, and judgment entered for the plaintiff according to his plaint, and that the respondent ought to pay the costs in the courts below and of this appeal.



In the Privy Council.

A. K. A. S. JAMAL

v.

MOOLLA DAWOOD SONS AND
COMPANY.

DELIVERED BY
LORD WRENBURY.

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