Privy Council Appeal No. 53 of 1916.

Peirce Leslie and Company - - - - *Appellants,*

v.

N. Giriah Chettiar - - - - - *Respondent,*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH MAY, 1917.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD PARKER OF WADDINGTON.
LORD PARMOOR.
SIR WALTER PHILLIMORE, BART.

[*Delivered by* SIR WALTER PHILLIMORE, BART.]

The litigation in this case has arisen out of a contract made on the 11th January, 1906, between the respondent Chettiar, plaintiff in the suit, as vendor, and the appellant firm, defendants, as purchasers of aloe fibre. The quantity contracted for was 10,000 maunds, the maund being a measure of weight equalling 25 English lbs., and the price was fixed at rupees 3 : 7 per maund. The whole was to be delivered within two months.

Four deliveries were made and taken, and these amounted to approximately 2,420 maunds, and 4,000 rupees had been paid on account, when the parties fell out.

No more deliveries were made or taken, and when the two months stipulated by the contract had expired, either of the parties gave notice to the other of claims for breach of contract. Chettiar then brought his action, claiming 4,318 rupees as balance of purchase-money for the quantity actually delivered and interest to date of suit, and damages for the refusal to take delivery of the balance of the contract.

The defendant firm denied liability, claimed 238 rupees as having been overpaid in respect of the fibre admitted to have

been delivered, and damages for the plaintiff's breach of contract in not delivering the balance.

The District Judge, by his judgment dated the 31st January, 1910, dismissed the plaintiff's suit, and found in favour of the defendant firm's claims for 238 rupees over-payment, and for damages, which he assessed at 5,304 rupees. But he gave no costs.

On appeal, the High Court of Judicature at Madras reversed this decision, gave the plaintiff judgment for the balance of purchase-money, 4,318 rupees, with interest at the rate of 9 per cent. per annum from the 2nd March, 1906, to the 2nd July, 1906, the date of bringing the action, and thereafter at 6 per cent. per annum till the date of realisation, and dismissed the counter-claim of the defendant firm.

The High Court did not give the plaintiff any damages. But he was to receive his proportionate costs in the District Court, to be ascertained in that Court, and a specified sum for his proportionate costs in the High Court.

The decree of the High Court is dated the 20th August, 1914. From this decree the defendant firm has appealed. The plaintiff has not entered a cross-appeal.

At the hearing before the District Judge objection was taken on behalf of the plaintiff to the admissibility of the claim for damages preferred by the defendant firm, on the ground that it was not matter of set-off and that a counter-claim was not admissible according to the code of civil procedure in force. The District Judge, after referring to certain reported cases, decided against this contention; and the plaintiff did not reopen the question in his appeal to the High Court, which must therefore be taken to have been decided as between the parties in accordance with the contention of the defendant firm.

The point is only mentioned because it has been contended on behalf of the plaintiff, respondent before this Board, that the counter-claim was not admissible, and that therefore the subject matter in dispute was not of sufficient value to make the appeal competent. This contention was disposed of by their Lordships in the course of the argument.

The contract was in the following terms, the words printed in italics being in writing, and the rest being a printed form :—

Messrs. Peirce Leslie & Co.,
Coimbatore.

Dear Sirs,

I have this day agreed to sell you Aloe Fibre and within the dates mentioned below, to deliver into *my godowns* at *Coimbatore*, in quality, dryage, &c., such as you shall approve at the rate of *Rs.* 3-7-0 *a maund of* 25 *lbs.*

Should you consider the *said stuff* on delivery is not sufficiently dry, clean and free from *pith, black, short* or not to your satisfaction, you shall be at liberty to reclean, &c., the same and to debit the cost to my account. *Cart-hire from my godown to yours to be paid by me.*

Provisional payment, if required on delivery into your godowns not to exceed :—

Rs. per.

The whole quantity now contracted for (*Ten thousand maunds*) 10,000 *maunds guaranteeing* 70 *per cent A*, 15 *per cent B and* 15 *per cent C* to be delivered within *two months* from this date.

Accounts to be settled so soon as the account shall have been received from the. . . . . .

All rejected produce to be at my risk.

In the event of any breach of this contract by me causing you to make breach of any contract entered into by you on the faith of this present contract, I undertake to indemnify you all loss or damage which you shall thereby suffer, this undertaking to be, not in substitution for but as supplemental to my ordinary liability in case of breach of contract.

I remain,
Dear Sirs,
Yours faithfully,
N. Giriah Chetty.

Terms accepted.

The above contract was explained to the contractor *N. Giriah Chettiar* in Tamil by

C. V. Nelson.
11*th January* 1906.

It is to be observed that the delivery was to be at the plaintiff's godown. The defendant firm accordingly sent to the plaintiff's godown, weighed and took delivery of four parcels on the 25th January, 3rd, 4th, and 21st February, making in all 2,419 maunds and 22 lbs. The 4,000 rupees were paid on the 6th February. The plaintiff was pressing the defendant firm to take further deliveries, and at length wrote on the 28th February in the following terms :—

Ever since I made contract to supply aloe fibre to your company, I have been requesting you on various occasions personally and in writing to weigh the stuff; but you have weighed only 2,420 maunds till now and 7,580 maunds are yet to be weighed. As you have not weighed the whole lot and paid the money, I have to undergo loss of interest. In accordance with the contract, there is only twelve days' time. I do not think that the balance will be weighed within that period even if weighment be commenced from this day. So, it is necessary that that period should be extended or that that period should be extended till weighment is completed. Please direct your clerk to weigh the stuff daily without delay. Awaiting an early reply.

The defendant firm answered on the 2nd March :—

Your letters of 28th ultimo and 2nd instant to hand. We have been ready to take delivery of your stuff for the past fortnight as we have frequently informed you personally and also in writing, but as your contract is for 70 per cent. A, 15 per cent. B, and 15 per cent. C, we cannot take delivery of this unless you sort and give it to us in your godown, especially as the few all round parcels we have taken delivery of to date, contain a large quantity of C and D of which latter quality we have a large quantity in our godown which is lying at your risk which please note. We cannot have our godown blocked with B, C and D we have not bought, and you must therefore let us sort out in your godown what we have bought, in the same way as others have done and are doing.

And the plaintiff replied on the 6th :—

I am in receipt of your letter dated 2nd March, 1905(6), and in reply I wish to inform you that the original contract was made with reference to the stock of fibre I had in my godown. The sorts A, B, C and D you now refer to were not talked of at the time of contract, and you agreed to take as per samples I gave you and 2,419 maunds and 22 lbs. were weighed with reference to the samples I gave you and an advance of Rs. 4,000 was given to me. It was agreed at the time of the contract that what you now consider as A, B, and C are only A, and that what you now consider as D consists of B and C, and you are entitled to reject only such fibre which are too short, pith and black, and if any rejection could be made, it must have been done when you weighed and your rejection now is too late and unreasonable. You have been putting off the weighing for a long time under some excuse or other. The price of fibre has gone very low and your sorting as A, B, C and D is not at all reasonable and is certainly due to the fall of price. I cannot undertake to supply as you now desire since it is against the terms of the original contract and your previous acceptance. I therefore wish to inform you that I am entitled to get from you Rs. 4,318-5-3 being the balance of price for the said 2,419 maunds and 22 lbs. supplied to you deducting Rs. 4,000 which you have paid. The remaining quantity of 7,580 maunds and 3 lbs. which I have still to deliver to you under the terms of our original contract is ready to be so delivered in my godown, and I do hereby give you notice that unless you take delivery of the same within the 11th of this month and pay me the price due, you will be held liable for all damages caused to me by your default.

These letters show what the dispute was.

The case for the plaintiff was that before the contract was made he had received a letter of the same date from Nelson, the broker for the defendant firm, in which the qualities were described as Nos. 1, 2 and 3, that Moss the representative of the defendant firm had with Nelson visited his godown and inspected some of the stock, untying the bundles of fibre and finding in a lot of 10 maunds 7 of first quality, 1½ of second, and 1½ of third; and that these qualities were the A, B and C of the contract; that Pillai, the servant of the defendant firm came from time to time to take the deliveries, rejecting that which was black or pith or of short fibre, weighing all he accepted and taking precautions from time to time to see that each delivery was according to the agreed proportions of 70 per cent. A, 15 per cent. B, and 15 per cent. C; so that the defendant firm was by its acceptance bound to admit not only that all the fibre taken was of a quality contracted for, but also that it was proportionate.

The case made by Moss for the defendant firm was that he had three standard qualities of fibre which he exported and sent to London, that he called these A, B and C, and had standard samples hanging up in his godown, that the plaintiff had been instructed to call at the firm's godown to see the standard samples, that he had seen them, that they were the A, B and C of the contract, that Pillai when he took delivery made no sorting and no inspection for quality, only weighed in order to

ascertain the total weight of each parcel; that when the fibre came to be sorted in his godown there were only 15 odd maunds of A, 83 odd of B, and 249 odd of C; that the balance which he called D was altogether outside the contract; and that it was his discovery of these facts which led him to write the letter of the 2nd March.

The plaintiff and Moss were examined as witnesses, and each side called other witnesses in support. But Nelson, although he was in Court, was not examined and the reason given for not calling him as a witness for the defendant firm was not a very convincing one.

However, the District Judge decided in favour of the defendant firm partly upon the construction of the contract and partly because upon the conflict of evidence he accepted the witnesses for the defence, and he alone has seen the witnesses.

He held that there was no acceptance of the goods when delivery was taken, because Moss had a right under the contract to reclean and reweigh; he took it that the A, B, and C of the contract were the A, B, and C of the standard samples kept by Moss, and that the goods actually delivered were not A, B, and C in proper proportions, but A, B, C, and D in the proportions asserted by Moss.

The High Court differed from the District Judge upon the construction of the contract, holding, first, that the contract was to supply 10,000 maunds, each containing the proper percentage of A, B, and C, holding, further, that there was an acceptance at the plaintiff's godown which precluded the defendant firm from making any subsequent rejection, leaving to it only the remedy of recleaning in proper cases at the expense of the plaintiff.

The High Court adopted the evidence given on behalf of the plaintiff so far as it bore upon the question whether the deliveries were accepted conditionally or absolutely, but apparently (for it is not very clear) took Moss's story as to the standard samples, and said that the defendant firm might have rejected the whole as not consisting of the three sorts of fibre in the proportion contracted for, and rejected the plaintiff's claim for damages on the ground that he had not and could not have delivered the balance of the fibre in proper qualities and proportions.

The ground upon which the Judges of the High Court gave the plaintiff the balance of the purchase price was that the defendant firm had precluded itself from raising any objection in respect of the fibre of which it took delivery, neither the objection that any part was not A, B, or C, nor the objection that the proper proportions had not been observed being open.

This finding would dispose of some part of the claim for damage put forward by the defendant firm, that part which rested upon their being entitled to reject all the so-called D's,

and apportion the rest as 70 maunds odd A, 272 maunds odd B, and 1,115 maunds odd C.

But it does not explain why the defendant firm, if the breach of contract was on the plaintiff's part, should not have had damages for non-delivery of 7,580 maunds, balance of the contract.

In deciding this case, their Lordships are of opinion that the first thing to be done is to construe the contract.

They cannot take the view which was apparently taken by the High Court, that it was a contract for 10,000 maunds, each delivery if not each maund to contain 70 per cent. A, 15 per cent. B, and 15 per cent. C, or that each delivery had to be proportionate. They consider that it was a contract to supply a lump quantity of fibre, the total quantity of which was to contain the requisite percentages, while the part deliveries might be in any proportions.

This being the case the defendant firm, when taking deliveries, could not refuse to take parcels because they did not contain the requisite percentages, until there came to be an absolute excess of one of the inferior qualities. The acceptance, therefore, was not an admission of the proportions, and it was for the defendant firm to sort the qualities after the stuff had reached the firm's godown and to classify it as they did. On the other hand, their Lordships cannot accept the construction given to the contract by the District Judge, which made the acceptance of the deliveries bind the defence to nothing except the actual weight of the fibre transferred.

The fibre was weighed and taken away from the plaintiff's godown as being fibre deliverable under the contract, and the receipt put in evidence treats the fibre as so delivered. It was not therefore, in the opinion of their Lordships, and to this extent they are in agreement with the High Court, open to the defence, to say afterwards that some of the fibre taken was neither A nor B nor C, but of an inadmissible quality, D.

It would be putting too much force upon the "et cetera" in the contract to construe it as giving to the firm a right to reject after the fibre had been brought to its godown. It is to be observed that whatever may be meant by the addition of "et cetera" to the word "reclean," the intention was that the goods should be kept, though something might be done to improve them at the plaintiff's expense.

In the result their Lordships must hold that there was a good delivery of 2,419 maunds 22 lbs., and that the defendant firm must pay for them at the overall price of rupees 3 : 7 per maund, and that the judgment of the High Court as to payment of this sum and interest must stand.

This, however, though it disposes of all claim by the defendant firm in respect of the deliveries actually made, does not dispose of the claim preferred by the defendant firm for damages.

For disposing of this claim it is necessary to determine

which party broke the contract; and upon the whole their Lordships come to the conclusion, agreeing in this with the District Judge, that it was the plaintiff who committed the breach.

They find both Courts substantially accepting Moss's story of the sample standards, and the classification put forward by the defence in so far as this classification points to a great shortage of quality A and a great preponderance of the inferior qualities. In these circumstances the request put forward in Moss's letter of the 2nd March was not an unreasonable one; and the plaintiff met it by an assertion as to qualities which was not well founded, and a refusal to supply except according to his view of the qualities.

On the whole this seems to their Lordships to have been the breach, and therefore the plaintiff must pay damages for his refusal to supply further under the contract.

The defence has up to a point put the claim to damages rightly. The lacking deliveries are not of so many maunds generally, but of so many maunds of each quality. Of A there were approximately 6,730 maunds short, and for these the plaintiff must pay damages.

But the defence must be taken to have over-estimated the shortage of B and C by the number of maunds which it sought to eliminate as being of quality D; that is, 721 odd. These must be attributed to class C till that class is filled up, and then to B.

The amount allowed by the District Judge for damages for failure to deliver requires readjustment on this footing.

The result is that the order of the High Court must be varied. The counter-claim of the defendant firm for damages for failure to deliver the balance contracted to be sold should not have been dismissed. Instead there should be a declaration that the defendant firm is entitled to damages for such failure and a reference to the Judge of the District Court to readjust the figures allowed by him under this head upon the footing above mentioned. Their Lordships are also of opinion that, in the circumstances, justice will be done if each party bears his own costs both here and in the Courts below. Their Lordships will humbly advise His Majesty accordingly.

Privy Council.

PEIRCE LESLIE AND COMPANY

v.

N. GIRIAH CHETTIAR.

DELIVERED BY
SIR WALTER PHILLIMORE, BART.

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