Privy Council Appeal No. 27 of 1918.

William Alexander and another - - - - - *Appellants*

v.

Gocul Dass and another - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD DECEMBER, 1918.

Present at the Hearing:

LORD DUNEDIN.
LORD ATKINSON.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD DUNEDIN.]

The appellants in this case are a firm of merchants dealing in piece goods. On three separate dates, namely the 7th February, 24th February, and 30th May, 1913, they entered into contracts with the respondents, who are a native firm in Madras, for the supply to them of prints and *sarries* at certain agreed prices. Seven contracts were of the first date, five of the second, and one of the third. The goods were, as both parties were aware, to be shipped from England. The goods began to arrive in the month of July, and continued to arrive at varying dates up to January, 1914. Due notice of the arrival of each consignment was given to the respondents, and the goods were tendered to them. The respondents accepted delivery of a considerable portion of the goods, and made no complaints till the 14th November, 1913. On that date they, for the first time, refused to accept certain of

the goods, and alleged three grounds of refusal, to wit, first, that the goods were late shipped, secondly that the appellants had promised the respondents a monopoly during the summer months of all such goods supplied by them and had failed to keep their promise, and thirdly that the goods were disconformed to contract in quality. The appellants at once replied that there was no contract as to the particular date of shipment, and that the goods had been delivered in due course as they came from England, and within reasonable time. As regards Points 2 and 3, they denied the allegations there made. Correspondence ensued in which the respondents averred that a special date of shipment had been agreed upon and argued the other points. It ended by the respondents accepting certain of the goods, but refusing to accept a considerable quantity upon the ground that they were entitled to rescind the contract as regards them on one or other of the grounds specified. The appellants then sold the goods. By this time the market had considerably fallen, and the prices realised were less than the contract prices. The appellants then commenced the present action for the difference between the contract price and the price realised.

To make the attitude taken by the respondents in their defence intelligible, it is necessary to set forth the form of the contracts. As they were all in similar terms one may be taken as a specimen, namely, the contract of the 7th February, 1913. The contract was made on a printed form in which there were blanks left for the filling up of the actual quantities of the goods sold and bought, the prices, &c. There was a set of added printed conditions. The contract of the 7th February as filled up stood as follows :—

" MADRAS,
" *7th February*, 1913.

" No. 1516.

" Terms cash, less 3 months discount equal to $1\frac{3}{4}$ per cent.

" Per I. 906, 907, 908, 909.

" We, hereinafter called the Dealers, have this day bought of Messrs. Alexander & Co., hereinafter called the Merchants :—

" S = 5 cases assorted ground sarries, 40 × $6\frac{1}{2}$ yards, at Rs. 1.14.6 per piece.

" G.A.

"$\frac{1}{2}$S = 8 cases do., 40 × 7 yards, at Rs. 2.0.6 do.
" S = 7 cases do., 40 × $7\frac{1}{4}$ yards at Rs. 2.1.6 do.
" S = 10 cases do., 40 × $7\frac{1}{4}$ yards, at Rs. 2.1.6 do.

" 1st quality.
" In 3 lots.

" 1. In the case of monthly deliveries the first lot shall be taken within 30 days from arrival and subsequent lots at intervals of not more than 30 days thereafter, provided nevertheless that should any one or more of such subsequent lots not arrive in time to be taken delivery of as above, such lot or lots shall be taken delivery of within 30 days from arrival provided always that the dealers shall not be compelled to take delivery of more than one lot in any one month. It is understood that the date of shipment arranged in respect to the goods specified in this contract,

carries 10 days grace. In the event of delivery being unduly delayed the dealers agree to cancel or to accept the goods when ready without making claim for allowance on account of such delay or such cancelment of the goods.

* * * * * *

"5. Should the above goods or any portion thereof remain uncleared by the dealers on due date, no claim whatever shall be entertained by the merchants for damage or deterioration however caused, theft, chafage, difference or inferiority in quality, or for short delivery or for any deficit or defect whatever.

* * * * * *

"The above terms and conditions have been fully explained to the dealers, who understand and accept the same.

"(Signed) MORLEE DOSS RAM DOSS & Co."

In this the word "per" was in print, but the additions "I. 906." &c., were in writing. It is common ground that the letter "I" means "indent," and that "No. 906" means the indent which under the number 906 was the contract made by the appellants with the English manufacturer for the supply of the goods. A copy of the indents is kept by the appellants in a book called the Indent Book, and a copy of Indent No. 906 is as follows :—

"Indent No. 906.

"MADRAS,

"28*th November*, 1912.

"Name of shippers : Messrs.

"Insurance : A.A.R. Reimbursement, as arranged.

"Order in force : Closed.

"It is understood that in the event of any dispute arising under this contract in respect to which the allowance claimed exceeds Rs. 200, the matter in difference shall be immediately referred to the Madras Chamber of Commerce, whose decision shall be final, or to two European merchants or their umpire, who shall also be a European merchant.

"Number of packages and pieces : 5 cases each 200 pieces.

"Width : 40 inches.

"Length : 6½ yards.

"Weight :

"Count :

"Description : Assortd. Grd. Ptd. Sarries, 1st quality.

"Price :

"Quality : As Indent 845.

"Finish : Do.

"Colour : Do.

"Heading : Do.

"Filling : Do. But 2 cases in plain centres.

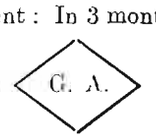
"Borders : Do.

"Stamp :

"Ticket : Do.

"Make up : Do.

"Shipment : In 3 monthly lots, May/July.

"Mark : 

"Remarks : Assortment of colours as Indent 845.

"(Signed) ALEXANDER & Co."

The respondents in their defences alleged that there was at the time of the contract an additional verbal agreement entered into that the date of shipment mentioned in the indent should be held as of the essence of the contract as between them and the appellants. They repeated their averment as to disconformity to contract, but abandoned their attitude as to monopoly. They also alleged certain faults on the part of the appellants in the conduct of the re-sale and challenged the figures of damage as brought by them. The case came before a learned Judge of the High Court, who after hearing evidence decided that the respondents had failed to make out the alleged parol agreement (which was denied by the appellants), and held that no objection in respect of disconformity could be made in respect of Clause 5 of the conditions. He found that the re-sale had been properly conducted; he examined the figures as brought out, and after a slight modification gave judgment for the appellants for the sum sued for.

The respondents appealed to the High Court in its appellate jurisdiction, and the learned Judges of that Court did not controvert the result at which the Trial Judge had arrived as to an independent parol contract, but they held that the words "per I. 906," &c., imported the terms of the indent into the contract, and made the time of shipment binding upon the appellants. They therefore dismissed the suit, but expressed the opinion that if they had come to the conclusion that there was liability, they would have agreed with the Trial Judge as to the amount for which he gave judgment.

Appeal has now been taken to His Majesty in Council, and the only question is whether this view of the Court below is right. If it is wrong their Lordships would not readily disturb the finding of the Trial Judge, who saw the witnesses as to a collateral parol agreement, nor do they see anything in the evidence which should lead them to do so.

It is admitted by the appellants that the words "per I. 906" do refer to the indent, and they say that the object of this being put there is to earmark for their own satisfaction the particular case out of which the goods sold were to be supplied and that they are in no sense a term of the contract. The reasoning of the learned Judges of the High Court in its appellate jurisdiction is chiefly directed to this point. They held that everything embodied in the contract must be held as part of the contract and cannot be treated as a *notandum*. This, however, falls quite short of the result necessary to be attained. It may be assumed that the words "per I. 906" are part of the contract. The question remains what term or terms do these words impose. Now it is to be noticed that the respondents did not see the indents; much of what was in the indents was not their concern, but that it was indicated that the goods contracted for were to be supplied out of the goods in the indent may fairly be taken to be the meaning. As a matter of fact the goods were so supplied. In each and every case the goods proffered for delivery under each of the

contracts were the goods contained in the indents mentioned on that contract. In order to prevail the respondents must push the argument much further, and must say that inasmuch as the indents contained a date of shipment, that date of shipment became a term of the contract between them and the appellants. The learned Chief Justice in the course of his judgment says :—

> "The conclusion that I have come to is that the defendants in signing this contract, which was prepared for them by the plaintiffs, were justified in assuming that the goods they were purchasing were goods coming forward under the indents which are mentioned in the body of the contract, and therefore were goods coming forward according to the shipments arranged under those indents; and reading the reference to the indents with the further provision in the printed conditions that 'the date of shipment arranged in respect of the goods carries ten days grace,' I think the proper conclusion is that the date of shipment in the indent was incorporated in the contract as the date of shipment under the contract."

Upon this it is to be remarked that mere assumption will not do, and the learned Judge makes a sudden leap when, passing from the assumption, he goes on to hold that the date of shipment was incorporated as a term of the contract. The unlikelihood of any such meaning is well shown by this consideration. By the terms of the indent viewed as a contract between the appellants and the English manufacturers, delay in shipment owing to a strike afforded a good excuse. As a matter of fact this was what actually happened and somewhat retarded the deliveries complained of. Yet if the contention of the respondents is right, the indent is not incorporated in all its clauses (for then the excuse would be good as against them also), but the particular clause as to shipment is made an independent stipulation binding the appellants to the respondents absolutely in a matter over which they had no control. It was urged by the respondents that they were very anxious, owing to certain native fairs, to have the goods at certain dates. The answer is that nothing would have been easier than to insert a clear and special statement as to delivery in the contract. Whether the appellants would have agreed to such a stipulation is another matter. That the respondents made enquiries as to the probable date of shipment and were informed is more than likely, but they were content to trust to the hope that expectation on that head would be realised.

The respondents also founded an argument on the terms of Condition 1. The answer is that it is a printed condition applicable to cases where a date of delivery has been fixed and here there was none fixed.

Their Lordships therefore think that the result at which the Trial Judge arrived was right and that no question being raised in view of the concurrent opinions as to the amount of the damages his judgment should be restored, costs being given to the appellants in the Courts below and before this Board. They will humbly advise His Majesty accordingly.

In the Privy Council.

WILLIAM ALEXANDER AND ANOTHER

v.

GOCUL DASS AND ANOTHER.

DELIVERED BY LORD DUNEDIN.

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