

Hurnandrai Fulchand - - - - - *Appellant*

Pragdas Budhsen - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL. DELIVERED THE 20TH DECEMBER, 1922.

Present at the Hearing :

LORD ATKINSON.

LORD SUMNER.

LORD CARSON.

MR. AMEER ALI.

[*Delivered by* LORD SUMNER.]

Though there is some difference between the various texts of the agreement, on which this action was brought, there is no doubt as to its substantial terms. It is an agreement for the sale of future goods, to be manufactured at and obtained from named Mills. It provides for the quantity and descriptions of these goods, for the prices at which the different descriptions are sold, and for the time and rate of delivery. To some minor and independent provisions and to the fact that some of the words are interlineated, no importance attaches. The agreement is simple and of a common type, and the whole question in dispute is whether it is an absolute contract to deliver the whole of the goods mentioned or whether the sellers are relieved from their obligation to deliver a part of them in the events which happened.

In the text adopted by the Courts below the provision as to delivery, after the words which complete the description of the goods, viz., "goods under manufacture are sold," runs as follows: "the same are to be taken delivery of as and when the

same may be received from the Mills. Delivery is to be caused to be given in full by the 31st December in the year 1918." An endeavour was made in argument to treat these words as a further part of the description of the subject-matter of the contract, so as to confine the goods to such as might be received from the Mills during the remainder of the year 1918. In their Lordships' opinion this attempt failed. The goods to be manufactured are already very elaborately described, and the goods which are to be delivered are the 864 bales so described. It was also suggested that the words "as and when same may be received from the Mills" should be construed, as if they were "if and when the same may be received from the Mills." This is to convert words, which fix the quantities and times for deliveries by instalments into a condition precedent to the obligation to deliver at all, and virtually makes a new contract. The words certainly regulate the manner of performance, but they do not reduce the fixed quantity sold to a mere maximum, or limit the sale to such goods, not exceeding 864 bales, as the Mills might deliver to the defendants during the remainder of the year.

If the contract is for a fixed quantity and, as was the case, less than that quantity was delivered within the time fixed, the sellers must either find in the contract some matter of excuse or discharge, or they must pay damages.

The High Court of Bombay found this excuse in the fact that the Mills failed to perform their contract to manufacture and deliver the goods to the respondents in the circumstances of the case. As a matter of fact the Mills remained in existence and at work, and the looms which could otherwise have manufactured goods deliverable under this contract were fully occupied in making goods for the Government of India. The utmost that the evidence on this point amounts to is to be found in the following evidence given by a witness from the Mills :—

"I know of contracts with the defendants up to March, 1918; delivery was up to date. After that Government contract work began, and defendant's dhoties were not proceeded with. The Mills were commandeered by Government. I had no personal knowledge of what took place between the agents and Government."

No evidence was given of the powers of Government to require their contract work to take precedence of other contract work, nor do the judgments of the High Court allude to the existence of such powers. No evidence was given that the Mills were requisitioned. It is clear that the Government did not take possession of them and, in spite of the use of the word "commandeered," it is the plain result of the evidence that the Government placed an order with the Mills for goods to be manufactured, and it was executed in preference to the order of the defendants. Whether the manufacturers' motives were patriotic or commercial does not matter. It was not suggested that there would be anything illegal in the receipt of these goods

by the defendants, if they could have got them, or in the delivery of them over to the plaintiffs. Accordingly, having failed to perform their bargain, the respondents must pay damages.

The High Court of Bombay appear to have been guided by considerations, which seem to their Lordships to have been mistaken. They interpreted the contract by asking themselves what it was likely that a reasonable business man would have bound himself to do; they thought that there had been what is called "frustration of the contract"; and they held that the case fell within the principle of *Taylor v. Caldwell* (3 B. and S. 826), and that a condition of things had failed to subsist at the time of performance, which had been mutually contemplated by the parties and finally agreed to be essential to the obligation of the seller to deliver.

On the first point the learned judges, no doubt by inadvertence, expressed a different proposition from that which they must have had in mind. To interpret a business bargain, expressed in the language of commerce, it is no doubt important to appreciate the methods and the point of view of business men, but this is merely a prudent way of qualifying the mind to construe their words, and so to determine their meaning, and is a very different thing from postulating that reasonable men would have been likely to agree to one kind of liability and not to another, and from thus concluding that, whatever the words of the contract say, that kind of liability, and that alone, is the obligation of the contract. As a matter of fact there is nothing surprising in a merchant's binding himself to procure certain goods at all events. It is a matter of price and of market expectations. No doubt it is a speculation, but many dealings even in cotton goods are of that character.

As to the doctrine of "frustration," the High Court of Bombay had not the advantage, at the time when the appeal was heard before them, of several discussions and decisions which have taken place in England since then in the House of Lords as well as in the Court of Appeal. The adventure, of which the commercial purpose is suggested to have been frustrated, is, of course, the purchase and sale of these goods between the parties to this contract, and this adventure was not frustrated. All that happened was, that the defendants failed to perform their contract. When they have paid the damages, one commercial purpose, at any rate, will, so far from being frustrated, have been fulfilled. Their Lordships think it unnecessary to enlarge upon the recent authorities.

The Mills, from which the goods were to come, no doubt were contemplated as continuing to exist, though it does not follow that, in a bargain and sale such as this, the closing or even the destruction of the Mills would affect a contract between third parties, which is in terms absolute; but the Mills did continue to exist and did continue to manufacture the goods in question, only they were made for and delivered to somebody else. This is

completely outside the principle of *Taylor v. Caldwell* (*supra*) or of the *Coronation* cases (*Krell v. Henry*, [1903] 2 K.B. 740; *The Civil Service Co-operative Society, Ltd. v. The General Steam Navigation Company*, [1903] 2 K.B. 756).

The parties having failed to agree the damages, the case must be remitted to the Court of the Trial Judge to assess them and to increase the amount adjudged to the plaintiffs accordingly, the appeal being allowed with costs here and below, and their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

HURNANDRAI FULCHAND

v.

PRAGDAS BUDHSEN.

DELIVERED BY LORD SUMNER.

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