

Privy Council Appeal No. 40 of 1944

Messrs. Siddique & Co. - - - - - *Appellants*

v.

Messrs. Utoomal & Assudamal Co. - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 13TH NOVEMBER, 1945

Present at the Hearing :

LORD THANKERTON

LORD SIMONDS

LORD GODDARD

[*Delivered by* LORD THANKERTON]

In this appeal it became obvious that there was one crucial point, the decision of which might supersede consideration of any further points.

Their Lordships wish to recall the essentials which have to be proved under section 31 of the Specific Relief Act of 1877. The plaintiffs (the present respondents) must prove that it was through a mutual mistake of the parties that the three contracts in question did not truly express the intention of the parties; and the duty of the court, before it can rectify, is to find it clearly proved that there has been mistake in framing the instrument, and it must ascertain the real intention of the parties in executing the instrument. On being satisfied of those two elements, it is in the discretion of the court to grant rectification.

In the present case it is unnecessary to consider the appellant-defendants' conduct or view vis-a-vis the question of mistake. The vital question in the appeal is whether the plaintiffs (the present respondents) have established that there was mistake on their part within the meaning of section 31.

Mr. Rewcastle, in a very frank and able statement, has admitted, and has rightly admitted, that the only person who could prove the purpose of putting the word "shipment" into the three contracts with which the present case is concerned was the witness Nanakram.

The case made, briefly put, was that Nanakram did not know the difference between the meaning of the word "shipment" and the word "delivery." Both courts in India are agreed that commonly there is a very material distinction between the two words; and the real question is whether it can be accepted at Nanakram's hands that on the 5th and 6th December, 1941, he did not know the difference between those two words.

The learned trial judge found difficulty in accepting that suggestion from Nanakram. It seems to be quite clear on his judgment that he did not accept it, and he held that the plaintiffs had failed to prove that alleged understanding and purpose of Nanakram in inserting the word "shipment" in the three contracts.

When the matter came before the High Court, the Chief Justice and Mr. Justice Chagla were agreed in accepting the trial judge's appreciation of the evidence, which included a discrediting of Nanakram as a witness; but Mr. Justice Chagla said in reference to Nanakram's evidence: "But, in the midst of contradictions and falsehoods which he has indulged in, one fact clearly emerges, and that is that he thought that the expression 'shipment' combined with the words 'to take delivery as soon as we get' meant the same thing as 'delivery' and when he inserted this expression in the contract he meant the same thing as if he had inserted 'January-February delivery'."

Their Lordships find themselves unable to agree with that finding, because they are, at the very least, of opinion, agreeing with the trial judge, that Nanakram has failed to prove that such was his understanding; but their Lordships are prepared to go further, in view of the fact that in relation to a contract concluded on the 4th December with some people called Nathalal, Nanakram had given instructions to the broker that, if Nathalal objected to the word "shipment," which was in that contract as drawn by Nanakram, it would be altered to the word "delivery" and that, following an objection by Nathalal being reported by the broker, in the result the word "shipment" was altered to "delivery" by Nanakram. That was done before he knew of any of the three contracts with the defendant-appellants in this case: yet he retains the word "shipment" in their contracts.

That of itself to their Lordships' minds is rather suggestive of the fact that he thought that there was some difference, or some advantage to him, in retaining those words; but when their Lordships find, a few days later, a contract of the 10th December, 1941, made by Nanakram with other parties, which contract was also for "shipment," they have this finding by the trial judge: "In respect of this contract correspondence took place between the plaintiffs and their purchasers. The plaintiffs insisted in the correspondence that those were shipment contracts and not of delivery." It does seem to be impossible to believe Nanakram when he maintains that until he came into the witness box he did not know that that there was any distinction between "shipment" and "delivery."

Therefore, their Lordships agree with the trial judge, when he said that he could not accept that view put forward by Nanakram, but, their Lordships go further, and do not believe it.

The result is that the plaintiffs have failed to prove that which it is necessary for them to prove, namely, that the three written contracts did not truly express the intention of the plaintiffs in framing the instrument, which is the requisite under section 31 of the Specific Relief Act. This necessarily negatives any case of mutual mistake.

That point having been decided adversely to the present respondents, the result is that further consideration of any other points becomes unnecessary and it follows that the appeal should be allowed, the judgment of the High Court as an appellate court should be set aside and the judgment of the High Court in its original jurisdiction dated the 7th December, 1942, should be restored with costs as stated therein. The respondents will pay the appellants' costs of this appeal and of the proceedings in the High Court since 7th December, 1942.

Their Lordships will humbly advise His Majesty accordingly.

1872

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DELIVERED BY LORD THANKERTON

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