L. J. Leach and Company Ltd.

Vs

Jardine Skinner and Co.

Civil Appeal No. 219 of 1953

(S. K. Das, N. H. Bhagwati, B. P. Sinha, T. L. Venkatarama Ayyar JJ)

22.01.1957

JUDGMENT

VENKATARAMA AYYAR J. -

This appeal arises out of a suit instituted by the appellants in the High Court of Bombay for damages for conversion estimated at Rs. 4,71,670-15-0. The suit was decreed by Shah J. sitting on the Original Side, but his judgment was reversed on appeal by Chagla C. J. and Gajendragadkar J. Against this judgment, the plaintiffs have preferred the present appeal on a certificate under Art. 133(1)(a) of the Constitution.

Messrs. Maitland Craig Lubricants Ltd. is an American Company engaged in the manufacture and sale of lubricants. It carried on business in India with its head office at Calcutta and a branch office at Bombay. The second plaintiff, H.J. Leach, was employed during the years 1933 to 1935 in the Bombay branch of the said Company. Subsequent thereto, the Company closed its Bombay branch, and eventually wound up its Calcutta office as well, and thereafter its business was taken over firstly by Ewing and Company and then by the defendants. After he left the service of Maitland Craig Lubricants Ltd., Mr. Leach started business as seller of lubricants on his own account and was importing them through the defendants. On June 6, 1941, they entered into an agreement, Ex. A, under which Mr. Leach was given an exclusive right to sell lubricants of the make of Maitland Craig Lubricants Ltd., within the limits of Bombay Presidency, Central Provinces, Rajputana and such parts of Central India and Hyderabad as might be determined by the defendants. The agreement was to continue for a period of five years "unless sooner determined in the manner hereunder provided." Clause 14 of the agreement runs as follows :

> "Notwithstanding anything hereinbefore contained this agreement shall be terminable by either of the parties hereto upon giving to the other three calendar months previous notice in writing expiring at any time but without prejudice to the rights and liabilities of the parties respectively which shall have accrued prior to such termination."

Clause 16 provides that the agreement was personal to the selling agent, and that he was not to assign or attempt to assign his rights thereunder without the consent of the defendants in writing first obtained. It is common ground that the dealings between the parties continued on the basis of this agreement during the relevant period.

On March 18, 1944, the first plaintiff, which is a Joint Stock Company, was incorporated under the provisions of the Indian Companies Act, and on March 30, 1944, the second plaintiff assigned his

business to it. On June 13, 1945, the defendants wrote to the second plaintiff that they were cancelling the agency constituted under the agreement dated June 6, 1941, as he had assigned the same to the first plaintiff without obtaining their consent in writing as provided therein. Before that date, however, the defendants had placed orders for import from America of certain goods which the plaintiffs had required, but these goods were actually received by them after the cancellation of the contract. The plaintiffs called upon them to deliver those goods to them, but they refused to do so. Thereupon, the plaintiffs instituted the present suit for damages for conversion alleging that the goods in question were due to them under Government quotas comprised in Nos. P.L. 1004 to 1007, and that the defendants who had ordered them on their behalf had themselves no title to them. The plaintiffs also averred that in importing those goods the defendants were acting as their agents. The defendants repudiated this claim. They contended that far from they being the agents of the plaintiffs, it was the second plaintiff who was their agent, and that the property in the goods was with the defendants and that the action for damages for conversion was not maintainable.

The suit was tried by Shah J. who held that the plaintiffs were not the agents of the defendants, that the goods in question had been imported by the latter on behalf of the former, and that in refusing to deliver the same to them, the defendants were guilty of conversion. He accordingly passed a decree referring the suit to the Commissioner for ascertaining the damages. On appeal, Chagla C.J. and Gajendragadkar held that on the terms of the agreement dated June 6, 1941, on which the suit was based, the title to the goods imported by the defendants vested in them, and that it would pass to the plaintiffs only when the defendants endorsed the shipping documents in their favour, and that as that had not been done, the claim for damages on the basis of conversion was misconceived. They accordingly allowed the appeal, and dismissed the suit.

Now the contention of the appellants before us is that on the facts proved, they were entitled to damages on the basis of conversion.

There is no dispute as to the position in law. Before the plaintiffs can maintain an action in trover, they must establish that they had title to the goods in question and that further they were entitled to possession thereof when they called upon the defendants to deliver them. If the parties stood in the relation of sellers and purchasers with reference to the transactions, then the plaintiffs must show that the property in the goods, which initially was with the defendants, passed to them in accordance with the provisions of the Sale of Goods Act. If, however, the defendants imported the goods as agents of the plaintiffs, then the title to them would undoubtedly be with the latter, and the only question then would be whether the former were entitled to retain possession, as they would be if they had paid the price of the goods on behalf of the principal, and had not been reimbursed that amount. This question, however, would not arise on the facts of this case, as the defendants denied the title of the plaintiffs to the goods, and there was no refusal by the latter to pay the price. The main question that arises for determination, therefore, is as to the relationship in which the parties stood with reference to the suit transactions.

It is conceded that to start with, it is the agreement, Ex. A, that governs the rights of the parties. It is therefore necessary to examine its terms to ascertain the true relationship of the parties thereunder. It has been already mentioned that under this agreement Mr. Leach was constituted the selling agent of the defendants in certain areas specified therein. Under Ex. A, the second plaintiff was not to sell the goods below a certain price, and they were also to be sold with the mark, Maitland Craig Lubricants Ltd. The course of business was that the second plaintiff used to intimate to the defendants his requirements. They would then import those goods in their own names from America under c.i.f. contracts. After importing them, they would fix their own price for those goods and endorse the

shipping documents in favour of the second plaintiff, who would be entitled to clear them at the harbour on payment of 80 per cent. of the price, the balance of 20 per cent. being payable on the delivery of the goods by him to his purchasers. The sales to be effected by the second plaintiff within the area to his own customers were matters which concerned only him and his purchasers. The defendants had nothing to do with them. Under cl. 6, the second plaintiff had to "keep the value of his stocks at all times fully insured against fire risk." Clause 13 is as follows :

> "The relationship between parties hereto shall be that of principal and principal only and the selling agent shall have no authority whatsoever except such as may be conferred upon him in writing by the firm to transact any business in the name of the firm or to bind the firm by any contract, agreement or undertaking with or to any third party."

In contract with these terms, there is cl. 4, which provides that the defendants would themselves supply to the Indian Stores Department all their requirements of lubricants within the territory allotted to the second plaintiff, who was to act as their agent in clearing the goods delivering them to the authorities. And for this, the second plaintiff was to be paid a commission.

It is clear that the agreement read as a whole is a composite one consisting of two distinct matters. So far as cl. 4 is concerned, the second plaintiff was merely an agent of the defendants. As regards the other clauses, the true relationship is, as stated in cl. 13, that the second plaintiff was purchaser of the goods from the defendants, and the conditions relating to the minimum price at which they could be sold and the marking of the goods with the name of Maitland Craig Lubricants Ltd. were only intended to protect their trade interests but that once the shipping documents were endorsed by the defendants to the second plaintiff, he became the owner of those goods. The object of the insurance clause was obviously to safeguard the interests of the defendants with reference to the balance price payable by the second plaintiff. In this case, we are not concerned with any goods consigned by the defendants for supply to the Government under cl. 4 but with goods which were imported by them for meeting the requirements of the plaintiffs. The relationship of the parties with reference to those goods, if it is governed by this agreement, is undoubtedly that neither party is agent of the other, and that the defendants are the sellers and the plaintiffs are the purchasers. If so, the title to the goods would pass to the plaintiffs only when the defendants appropriated them to the contract, as for example, by endorsing the shipping documents, and as that had not been done, the claim for damages on the ground of conversion would be misconceived.

The learned Solicitor-General who appeared for the appellants, did not dispute that this was the position under Ex. A. But he contended that the relationship of seller and purchaser created by the agreement became modified when the Government introduced the licence system. That was introduced in August-September, 1941, while the war was on, with a view to regulate and control imports. The system adopted was that every importer was required to give a statement as to the extent of his import business during the preceding years, and on the basis of that statement, a licence was given to him to import up to a limit. On September 26, 1941, the second plaintiff applied to the Controller for a licence to import lubricants stating that he had been doing that business for seven years and giving particulars as to the volume of his business. Sometime in November, a licence was granted to him by the Government. The defendants also applied for a licence to import lubricants based on the volume of their business and obtained it. That licence did not include the quantity which they sold to the second plaintiff, and thus the two licences were mutually exclusive. Mr. Leach would have been himself entitled under the licence to import goods directly from America, but he chose to import them through the defendants as before, because under the terms of the

agreement, Ex. A, he would have to pay only 80 per cent. of the price when clearing the goods. There was, however, this change in the character of the transaction, that whereas before the licence system the defendants were the purchasers from American Companies under c.i.f. contracts and they then sold the goods to the second plaintiff on a price fixed by them, under the license system the price payable to them was only what they themselves had to pay to the American sellers with an addition by way of commission on the transaction.

Now, the argument of the appellants is that as they were the persons entitled to import the goods under the licence granted to them, in importing them on their requisition the defendants must be held to have acted for them, and that the relationship between them was no longer one of seller and purchaser under Ex. A but of agent and principal. To this, the answer of Mr. Banaji, learned counsel for the respondents, was two-fold. He contended firstly that in applying for and obtaining the licence in his own name, the second plaintiff was merely acting as the agent of the defendants, and secondly that the present contention was not raised in the plaint and was, therefore, not open to the appellants. On the first contention he referred us to the correspondence which passed between the parties at the relevant period. On September 5, 1941, the defendants wrote to the second plaintiff to send particulars of certain shipments consigned to him so that they could include them in their application for licence, and on September 11, 1941, they further wrote to him that those goods were not to be included in his application for licence. But the second plaintiff was obviously not agreeable to it, and actually included those very shipments in his application for licence dated September 26, 1941. The defendants did not pursue the matter further, and wrote to the second plaintiff on December 10, 1941, to intimate to them the number and date of his import licence and continued to import goods for him on the basis of that licence. Counsel for respondents relied on a letter dated December 11, 1941, in which the defendants advised the second plaintiff to join a group of oil merchants, which was to be formed at Bombay, but that was obviously by way of advice to him as a customer. This evidence is too inconclusive and too slender to support the contention that the second plaintiff obtained the licence as the agent of the defendants. On the other hand, if the true position of the second plaintiff under Ex. A was that he was a purchaser of goods, then the sales by him of those goods were as owner and the licence issued to him on the basis of those sales must have been given to him in his own right and not as agent of the defendants. This was the finding of Shah J. and that has not been reversed on appeal, and we are in agreement with it.

It is next contended that the entire plaint is framed on the footing that the rights of the parties are governed by Ex. A, that there is no averment therein that that new agreement had been cancelled or modified and that a new agreement had been substituted after the licence system was introduced, that the evidence of Mr. Leach in the box was also that Ex. A was in force throughout the period, and that therefore it was not open to the appellants now to contend that the relationship of seller and purchaser under Ex. A had been altered into one of agent and principal. It is true that the plaint proceeds on the basis that Ex. A is in force, and there is no allegation that it had been modified. But Ex. A had not been wholly abandoned. It was still in force governing the relationship of the parties in respect of various matters such as delivery of goods on payment of 80 per cent. of the price. The plaint does refer to the introduction of the licence system, and the defendants clearly knew as much of the true position thereunder as the plaintiffs, and there could be no question of surprise. Under the circumstances, if the rights of the parties had to be determined on the basis of the licence system, we would have hesitated to non-suit the appellants merely on the ground that the effect of that system had not been expressly stated in the plaint.

But then, the licence system itself came to an end in March-April, 1942, and was replaced by what is known as "Lease and Lend" scheme. It was under this scheme that the goods which form the

subject-matter of this litigation were imported, and we have therefore to examine what the rights of the parties are with reference to the incidents of that scheme taken along with Ex. A, which is admitted by the appellants to have been in force. This scheme was introduced by the Government of India as a war measure to facilitate the import of certain essential goods and to conserve them for the effective prosecution of the war. Oil and lubricants were among the goods which were controlled under this scheme. Under it, the Government prohibited the direct import of oil and lubricants from America through private agencies, whether individuals, firms or companies and took upon itself to import the required quantity.

An association of importers and dealers in Calcutta called the Central Lubricants Advisory Committee (C.L.A.C.) was formed, and importers were to write to the Committee what quantity they required to be imported on their behalf. This Committee was a private body, and served as a liaison between the importers and the Government. A similar Committee was formed at Bombay called the Bombay Lubricants Advisory Committee (B.L.A.C.). The procedure adopted in the import of goods was this : the importers were to state their requirements to the Committee which sent the same to the Government. Then on intimation given by the Government authorities, the dealers would have to make deposits an account of the price to be paid for the goods. The Government had a purchasing agent in America and he would be required by them to purchase the requisite goods and to arrange to get them transhipped to the destinations in India mentioned by the several dealers. The shipping documents would be taken in the name of the Government and on payment of the bills endorsed over to the importer for clearance at the harbour. The features of the system to be noticed are that it was the Government who was the importer of the goods and the dealers became entitled to the goods only on the shipping documents being endorsed to them by the Government.

Now, so far as the plaintiffs are concerned, the facts are that they made no deposits with the Government, and their names were not in the list of traders for whom the Government imported the goods. They had direct dealings only with the defendants and sent their requirements to them. The defendants would in their application to the Government include what the plaintiffs required as well as what they themselves required and make the necessary deposits for all the goods. But all that would stand only in their name. Though it would be possible to ascertain by reference to the correspondence between the parties which of the orders placed by the defendants with the Government related to the requirements of the plaintiffs, so far as the Government itself was concerned it knew only of the defendants as importers, and it was in their name that it would endorse the shipping documents, and it was only when the defendants in their turn endorsed the same to them that the plaintiffs would get title to the goods, and the evidence of Mr. Leach makes it clear that this had not been done, as regards the shipments with which the suit is concerned. This is what he says in his deposition.

> "The goods were shipped all to the order of the Government of India.... Separate documents were drawn up in respect of the consignments which were to be supplied to each of the trader according to his requirement submitted to Government. The traders who submitted their requirements cleared the goods by paying the amount of the bills .... The Government did not make any allocation to me. I depended on the defendants for obtaining my requirements from the Government. I did not make any cash deposit as required of the dealer. I made no deposit with the Government in respect of the quantity which I wanted. The entire deposit was made with the Government by the defendants even in respect of my requirements... The defendants endorsed over the documents in my favour for goods which were meant for me ....

> Excepting for the admitted portions the documents for remaining part of PL. 1004 to 1007 were not handed over to me or endorsed in my favour, except to the extent to which the goods were delivered."

The evidence of Sir John Burder for the defendants was "the shipping documents were received in the name of the defendants". It is thus clearly established that with reference to the goods comprised in P.L. 1004 to 1007, which formed the subject-matter of the suit, the shipping documents had not been made out in the name of the plaintiffs, nor had the defendants in whose names they were taken, endorsed the same to them. That being so, unless the plaintiffs established that the defendants were importing the goods as their agents, they would not have title to them, and the claim for damages on the basis of conversion must fail.

We should mention that the appellants relied on some of the letters written by the defendants as showing that they recognised the plaintiffs as having the title to the goods. Thus, on August 12, 1944, the defendants wrote to the plaintiffs "We confirm that the consignment is for you", and on March 24, 1945, they wrote, "We enclose herewith a statement showing quantities and grades that have been ordered by Government on your account against order P.L. 1006/10". But these statements are quite consistent with the position of the defendants as sellers who had ordered the goods on the requisition of the plaintiffs, and do not import that title thereto had passed to them, which could be only after the goods came into existence and were appropriated. That did not happen in this case, and the shipping documents continued in the name of the defendants. We therefore agree with the learned Judges that on the pleadings and on the evidence the claim for damages on the footing of conversion must fail.

That would entail the dismissal of this appeal, but the plaintiffs have applied to this Court for amendment of the plaint by raising, in the alternative, a claim for damages for breach of contract for non-delivery of the goods. The respondents resist the application. They contend that the amendment introduces a new cause of action, that a suit on that cause of action would now be barred by limitation, that the plaintiffs had ample opportunity to amend their plaint but that they failed to do so, and that owing to lapse of time the defendants would be seriously prejudiced if this new claim were allowed to be raised. There is considerable force in the objections. But after giving due weight to them, we are of opinion that this is a fit case in which the amendment ought to be allowed. The plaintiffs do not claim any damages for wrongful termination of the agreement, Ex. A, by the notice dated June 13, 1945. What they claim is only damages for non-delivery of goods in respect of orders placed by them and accepted by the defendants prior to the termination of the agreement by that notice. Clause 14 of the agreement expressly reserves that right to the plaintiffs. The suit being founded on Ex. A, a claim based on cl. 14 thereof cannot be said to be foreign to the scope of the suit. Schedule E to the plaint mentions the several indents in respect of which the defendants had committed default by refusing to deliver the goods, and the damages claimed are also stated therein. The plaintiffs seek by their amendment only to claim damages in respect of those consignments. The prayer in the plaint is itself general and merely claims damages. Thus, all the allegations which are necessary for sustaining a claim for damages for breach of contract are already in the plaint. What is lacking is only the allegation that the plaintiffs are, in the alternative, entitled to claim damages for breach of contract by the defendants in not delivering the goods.

It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice. In

Charan Das v. Amir Khan [[1920] 47 I.A. 255.] the Privy Council observed :

> "That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where the effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are out-weighed by the special circumstances of the case."

Vide also Kisan Das v. Rachappa [[1909] I.L.R. 33 Bombay 644.].

In the present case, apart from the contents of the plaint already set out, there is the fact that the defendants cancelled the contract without strictly complying with the terms of cl. 14. The ground on which they repudiated the contract was that the second plaintiff had assigned his interests to the first plaintiff; but the record shows that subsequent to the assignment the defendants had business transactions with both the plaintiffs and therefore the ground for cancellation appears to have been a mere device to deprive the plaintiffs of the benefits of the orders which they had placed. We are of opinion that the justice of the case requires that the amendment should be granted. The plaintiffs will accordingly be allowed to amend the plaint as follows :

> "12(a) In the alternative and without prejudice to the claim on the footing of conversion, the plaintiffs say that by reason of the facts aforesaid, there was a contract between the parties whereby the defendants undertook to supply and deliver to the plaintiffs (or either of them) the goods ordered out by Government on their (the plaintiffs') account and included in the quotas PL. 1004-PL. 1007. The said goods arrived in Bombay, but the defendants failed and neglected to deliver the same though demanded, and in fact repudiated their obligation to deliver. The plaintiffs say that they were always ready and willing to pay for and take delivery of the same.
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> The defendants at all material times well knew that the plaintiffs had purchased the same for resale and for fulfilment of contracts of sale and supply. The plaintiffs claim damages as per particulars."

This appeal must accordingly be allowed, the decree under appeal set aside, and the suit remanded for rehearing to the trial court. The defendants will file their written statement to the amended claim and the suit will be tried and disposed of in accordance with law.

There remains the question of costs. As the plaintiffs are getting an indulgence, they must pay the costs of the defendants both in the suit and in the appeal to the Bombay High Court. So far as costs of this appeal are concerned, as the defendants persisted in thier contention that the plaintiffs were only acting as their agents, a contention which, if upheld, would have furnished a conclusive answer to the amended claim as well, we direct the parties to bear their own costs in this Court.

Appeal allowed.

Case remanded.

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