CALCUTTA HIGH COURT

Anglo-india jute mills co

Vs

omademull

(lajenkins h. Jenkins C.J. woodroffe, J.)

26.07.1910

JUDGMENT

lawrence h. Jenkins, C.J.

1. This appeal arises out of a suit brought by the firm of chandermull serahmull and one luchminarain kanoria against the anglo-india jute mill company, ltd., for delivery of 1,00,000 yards of hessian cloth and damages, or the value of the foods with damages, or for rs. 7,750 as damages for the conversion of the goods.

2. A decree has been passed in the plaintiff' favour by fletcher, j. And from this the defendant company have appealed.

3. The facts are these on the 1st march 1909 the defendant company sold 3,00,000 yards of hessian cloth and in the sold note sent to them by brokers messrs. Janki dass & co., the sale was expressed to be to the brokers' principals. Under the incorporated conditions payments were to be made in cash in exchange for delivery orders or on certain other specified terms which have no application in this case (paragraph 3) and delivery of the goods was to be given and taken on the terms "ready payment against pucca delivery order." three delivery orders nos. M 1/50, m 1/51 and m 1/52 bearing the date the 2nd march 1909 were issued by the defendant company to messrs. Janki dass & co. By whom they were pledged to the firm of chandermull serahmull to secure repayment with interest of the sum of its. 18,000 then advanced by the plaintiff firm to messrs. Janki dass & co. The plaintiff luchminarain kanoria was also interested in the advance. Subsequently an agreement was made between the plaintiffs and messrs. Janki dass & co. Under which for valuable consideration the plaintiffs gave up the delivery orders m 1/51 and m 1/52 and obtained from messrs. Janki dass & co. An assignment of their equity of redemption in delivery order m 1/50 and the 1,00,000 yards of hessian cloth represented thereby. It is on this delivery older, m 1/50 that the plaintiffs' present claim is based. The defendant company resist the plaintiffs' claim on the ground that they are unpaid sellers of the goods, and that they have a lien on them so long as they remain in their possession, and the price or any part of it remains

unpaid.

4. So fax i have merely set out the broad outline of the case; the details still have to be filled in.

5. The plaintiffs' version is that on the 3rd march the plaintiff luchminarain met nando kishore, a partner in messrs. Janki dass & co., near the office of the defendant company, that he was asked by nando kishore to make an advance on three delivery orders of the defendant company to which he assented, that he took the three delivery orders being those with which we are concerned in this suit, to the office of the defendant company, where he showed them to mr. Young, who, in reply to his enquiry whether the delivery orders were correct or in order, assured him they were all right. Luchminarain says that he 111 en came out of the office and returned the delivery orders to nando kishore telling him that he would get money the following day from chandermull serahmull, and that on that same day he went to that firm and informed them that its. 18,000 would have to be paid the following day to janki dass & co. On pucca delivery orders.

6. The whole of this incident is denied by the defendant company, but fletcher, j. Accepted it as true, and i think we ought to accept his view as correct, and more especially as it is uncontradicted though it was within the power of the defendant company to have called evidence to show that no such incident occurred. It may be that mr. Young's absence from india, prevented his being called, but it obviously was within the defendant company's power to call evidence from their own office that the delivery orders were not then issued, if as their counsel has argued that, that was the fact, and they could have called nando kishore to deny the visit to the defendant company's office on the 3rd with the delivery orders, if that story was untrue. Counsel for the defendant company suggested in explanation of this omission that relations with nando kishore were strained, but for this suggestion there is no foundation in the evidence: on the contrary it appears from the judgment of fletcher j. And it is not disputed that members of the firm of janki dass & co. Were sitting behind counsel for the defendant company and produced certain documents in the course of the trial and it was further admitted that the defendant company opened a ledger account of janki dass & co. Since august 1909, though they had not got one on the, previous 4th march. On the 4th the delivery orders were handed to the plaintiffs and of the sum of rs. 18,000 was advanced and was paid into janki dass & co.'s account with the bengal national bank.

7. On the same date messrs. Janki dass & co. Handed the defendant company a cheque dated the 5th, but this post-dated cheque was in fact not paid into the defendant company's bank till the 8th of march when it was dishonoured. The defendant company have given no evidence in explanation of this delay, but the plaintiffs show from janki dass & co.'s pass-book which was by consent admitted in evidence before fletcher. J., that though the rs. 18,000 received from the plaintiffs did not actually go to pay what was payable on the post-dated cheque, almost the whole of it went to satisfy other claims of the defendant company.

8. The delivery order in suit was in these terms: Please deliver to messrs. Janki dass & co.'s principals or order 50 bs. = 100,000 yds. Hessian cloth 40 in. 71/2 oz. 9 x 9 each 2,000 yds. (one hundred thousand yards only) ready shipment rs. 113.

9. This delivery order was indorsed to the plaintiffs by way of pledge on the 4th of march and this the plaintiffs maintain entitles them in the circumstances to the decree fletcher, j. Has passed in their favour. The defendant company on the other hand urge that the delivery order was not a document of title, that it was not negotiable, and that no goods passed. But to this the plaintiffs reply, (a) that this delivery order did pass by indorsement, (b) that the issue of the delivery order in the circumstances was a representation on which the plaintiffs acted, that the cash payable in respect of the goods to which it referred had been paid, and (c) that it is not open to the defendants to contend that the property in the goods had not passed or to place reliance on their not having passed if that was the fact.

10. First then, i will deal with, the question whether these delivery orders pass by indorsement. It is to be noticed that the delivery order was in favour of messrs. Janki dass & co.'s principals or order, so that the document itself points to its being transferable by indorsement.

11. But beyond this there is ample evidence that these delivery orders pass from hand to hand by indorsement, and that as fletcher j., holds they are sold and dealt with in the market. On the other hand there is not a word in the evidence to support mr. Zorab's argument that for their transfer a document of assignment is necessary. That the delivery order on which this suit is based was duly indorsed in the plaintiff's favour on the 4th of march has not been disputed.

12. I next have to consider whether the issue of the delivery order amounted to a representation that payment had been made to the defendant company for the goods to which it related.

13. On this point we start with, the emphatic evidence of the defendant company's witness, mr. Tyrol, which is recorded as follows:

Q. There is not much tick credit in this trade on either side?
A. None whatever.
Q. You don't part with your documents without the cash and he wants his documents representing the goods before he pays?
A. Yes.
Q. These delivery orders are considered a good tender under a contract?
A. Oh, yes.
Q. It is for the purpose of really making a tender that you make them out?
A. Yes, we send them round with a sircar as a rule.

14. I need not refer to the plaintiffs' evidence in detail; it will suffice to say that it fully supports

the position that according to the invariable course of dealing in the calcutta jute trade delivery orders are only issued on cash payment, and that they are dealt with in the market as absolutely re-presenting the goods to which they relate. This is borne out by the contract in this case which specifically provides that "payments are to be made in cash in exchange for delivery orders on sellers," and contain the stipulation "ready payment against pucca delivery order." and in this connection it is worthy of notice that the delivery order in suit which is a pucca-delivery order embodies the term "ready shipment."

15. Then we have the interview with mr. Young, which i have already held to be proved.

16. An attempt has been made to minimise its effect, but it appears to me to be matter of plain commonsense that, as between business men mr. Young's reply would be regarded as an assurance that the delivery orders could be safely dealt with an the ordinary course of business, and i have been in no way impressed with the analytical argument to which ave have been subjected by counsel for the defendant company on tins point. Mr. Young could not have honestly replied as he did and i absolutely, decline to impute dishonesty to him - if he gave his reply with the mental reservation that if luchminarain dealt with the delivery orders for value he might find he took nothing, because janki dass & co. Had not paid for the goods. And after all why should these delivery orders have been issued as they were, unless it was contemplated that messrs. Janki dass & co., would at once deal with them for value either by way of sale or pledge? To this the defendant company have vouchsafed no answer. Now here again i would for a moment recall the facts. These delivery orders bearing date the 2nd of march, were issued by the defendant company to janki dass & co., not later that the 3rd of march, and were on that day placed in luehminarain's hands and shewn by him to mr. Young. On the 4th after luchminarain had promised.to make an advance on them the defendant company take a post-dated cheque from janki dass & co., in respect of the three delivery orders including that in suit. Though this cheque is dated the 5th of march, it in fact was not paid until the 8th when it was dishonoured. In the meantime the defendant company had paid in on the 4th two postdated cheques of the 3rd which they had received from janki dass & co., in respect of other transactions. These were honoured, and it is admitted by the defendant company as their bank pass-book. Makes plain that rs. 15,000 odd of rs. 18,000 advanced by the plaintiffs went towards the post dated cheques so paid in.

17. Now there is not a word of explanation from the defendant company's side as to why the delivery orders in suit should have been issued on the 3rd, or as to why these postdated cheques were taken; it is obvious that the defendant company have had the benefit of the money advanced by the plaintiffs, and, if their contention is to prevail, they will not only have had the benefit of his advance, but also of the goods on which the advance was made in consequence of their conduct the bare fact that the plaintiffs' money has come to them may not have a direct bearing on the legal position, but it undoubtedly lends colour of probability to the contention that the delivery orders were handed over to janki dass & co., to enable them to raise money on them, as in fact they did to the advantage of the defendant company. And this gains the greater force from

the fact that no one connected with the defendant company has ventured into the witness box to explain how the delivery orders came to be issued on the 3rd., or why post-dated cheques were taken, or to repel the argument that they acted as they did to enable janki dass & co. To raise money on the delivery orders, or to deny that the issue of delivery orders has the implication, and conveys to those engaged in this trade the assurance for which the plaintiffs contend. The conclusion then to which i come is that the defendant company intentionally caused or permitted the plaintiffs to believe that the cash payable in respect of the goods to which the delivery order related had in fact been paid, and that the plaintiffs acted on that belief, and i therefore hold that the defendant company cannot in this suit be allowed to deny that such cash was paid, and therefore they cannot claim to be entitled to a lien as against the plaintiffs., but then it is argued for the defendant company that the plaintiffs cannot succeed, as the property in the goods did not pass since there was no appropriation of them to this delivery order; and it is contended that no reliance can be placed on the 1st exception to section 108 of the contract act, inasmuch as, in the, circumstances, the delivery order was not a document of title. It is difficult to see how the defendant company can successfully rely on this plea in view of my conclusion as to the lien claimed by them; but, however, that may be, i think it must fail.

18. In india there is now statutory recognition of a delivery order as. A document of, title (see section 108 of the contract act and section 137 of the transfer of property act) and under it the transferee acquires a title to the goods to which it relates.

19. It is, however, urged, that, in this case, it cannot be regarded as a document of title, seeing that the goods to which it relates were not ascertained. But in fact the defendant company have adduced no evidence to prove that the goods had not been ascertained, though this was a fact specially within their knowledge (section 106, evidence act). And apart from this the defendant company can not be heard to advance this plea, and for substantially the same reasons as preclude them from showing cash was not paid.

20. They do not suggest that there were not goods applicable to the delivery order, they only say they have not been ascertained. But having regard to the terms of the delivery order, the known course of dealing in this market, mr. Young's representation, and their own conduct, the defendant company must be taken to have appropriated goods of the required quantity and description to this delivery order, and they cannot now be heard to deny that they held these goods for the plaintiffs. And it must be borne in mind that we have not to consider whether property passed as between the original sellers and buyers, but whether in the events that have happened, the sellers can assert this against the plaintiffs who have acted on the faith of the seller's representation that no lien existed and that they held goods to answer the delivery order. In nay opinion the defendant company's contention on this head must also fail, for in the circumstances, the defendant company have represented that the delivery order would pass and confer a good title, and they put it in the power of messrs. Janki dass & co., to indorse the delivery order with this representation to the plaintiffs, who, dealing in good faith and for value,

were induced to alter their position on the faith of the representation so made. In these circumstances the defendant company cannot be allowed to defeat the right which the plaintiffs have thus acquired: goodwin v. Robarts (1876) l.r. 1 a.c. 476. No thing has been said against the amount of damages awarded by fletcher, j. And they must be accepted as correct. His decree, therefore, must be confirmed and this appeal dismissed with costs.

Woodrefe, j.

21. I agree.