

# **BOMBAY HIGH COURT**

The Phoenix Mills Ltd

Vs

Madhavdas Rupchand

(Macleod, J.)

16.11.1916

## **JUDGMENT**

### **Macleod, J.**

1. On the 18th of September 1913, the Phoenix Mills, Limited, the plaintiffs in this suit, entered into a contract with Madhavdas Rupchand & Co., for the purchase and sale of certain bales of yarn. Madhavdas Rupchand & Co., the defendants in the suit, signed a memorandum of sale which contains a number of printed terms, while the number of bales, the price, the method and time of delivery are entered in manuscript. The memorandum of sale was confirmed on behalf of the plaintiffs by a letter of the same date signed by the agents No. 1 of the printed terms is as follows :-We (i.e. the defendants) agree to pay for the bales in advance at the time of taking delivery order for the bales, and to take delivery of them from time to time as they are ready (the date of the bales that are ready to be ascertained by us by inquiring at the Company's office), but if we fail to take delivery of the bales as stipulated, we agree to pay interest at the rate of 12 annas percent per mensem, on the purchase money on such bales as are ready.

2. If we fail to take delivery of the bales at the stipulated time, we agree to pay rent to the Company for the bales lying on our account in the Company's godowns at the rate of one quarter anna per bale per day.

3. If we fail to take delivery of the bales as stipulated and if the Company wish to keep them no longer on their hands, they are at perfect liberty to resell them on our account and risk by public auction or by private sale, and we hereby agree to make good to the Company any loss that they may suffer by the resale. In case of such resale we further agree that the Company shall also have the right to annul the whole contract, or a part thereof respecting the remaining bales that are to be manufactured, and claim from us any damage whatever they may sustain.

2. The terms of delivery are in manuscript :

200 Bales No. 20s and 20 1/2s Ring October-November 1913 and 50 Bales No: 6 1/2s Mule yarn as manufactured.

3. I am not concerned with 50 bales 6 1/2s. But the plaintiffs claim in this suit that the defendants failed to take delivery of 34 bales of 20s and 58 bales of 20 1/2s so that they were compelled under Clause 3 to sell the bales by auction and they now sue for the difference between the contract price and the price realised at the auction.

4. The first question is as regards the construction of the contract. That is an extremely difficult matter as the printed terms do not fit in with the manuscript terms as far as 200 bales of 20s and 20 1/2s are concerned. It is in evidence that generally the Mills contract to sell goods as manufactured, and it appears that the printed terms had been framed only with reference to the contracts for sale of goods as manufactured. But even then the terms of the contract would seem to be uncertain. As there is no obligation on the Mills to manufacture goods for a particular purchaser, they might put him off to an indefinite time by saying they were manufacturing for somebody else. But it seems from the evidence that the usual practice is to have a number of contracts on hand if they can make them on favourable terms, and that the Mills continue to spin yarn according to their ordinary production, while the purchasers under their various contracts come and ask for delivery and delivery is given according to the stocks in hand at the time; and apparently, provided no crisis in the market intervenes, this somewhat nebulous practice is satisfactory to both the parties. When, as in this case, a particular month for giving delivery is mentioned in the contract, it seems obvious that difficulties may arise regarding the interpretation of the first three clauses of the contract. Usually when delivery is to be given for certain months on an instalment contract the contract states how many bales or what quantity is to be delivered in each month, and the purchaser may not come on the last day and demand delivery of all that he had contracted to purchase. I must take it that, looking at the plain meaning of the contract, the Court can only consider the parties to have intended, when they signed that contract, that delivery should be asked for and given during October-November of two-hundred bales, delivery being asked for of reasonable quantities at a time during the period of delivery. It has now been proved on the evidence for the plaintiffs that no delivery was asked for by the defendants during October-November and no goods were manufactured by the plaintiffs against this contract. It was not pleaded in the written statement that delivery had been asked for during October-November and that therefore the plaintiffs had committed a breach by not giving delivery. Therefore, I disallowed any evidence from the defendants to the effect that they had asked for delivery during October-November. But it appears that, on the 3rd of December, five bales of 20s were delivered to the defendants. Those bales not being manufactured against the contract were delivered out of the stock at the Mills. Exhibit No. 3 is the daily report of 4th December 1913 and that shows that the plaintiffs were not spinning against the defendants' contract for the

report merely records that they had no bales on hand on behalf of the defendants but shows a reduction of five bales in the column "Bales to be made" under the defendants' contract. And so from January until the beginning of July the defendants took delivery by small quantities at a time of sixty-six bales of 20s and 42 bales of 20 1/2s paying for them at the rates mentioned in the contract. Then I have no doubt that if ordinary circumstances had continued they would have gone on taking delivery of the remaining bales. But in July prices declined owing to the critical situation in Europe. Not only the defendants but also the other purchasers from the Mills practically stopped taking delivery. During August and September the Mills only delivered ten bales of 20s and no bales of 20 1/2s. On the 19th of January 1914 the plaintiffs had written to the defendants: We regret to find that you have up to now taken delivery of only 10 bales of yarn from the above contract, though the term of the contract is for delivery October-November 1st. Kindly therefore arrange to take immediate delivery of same, failing which we shall be obliged to charge you interest, godown rent, and fire insurance on the number of bales that may be ready on your account of which please take note.

5. I will presume that when the plaintiffs asked the defendants to "arrange to take immediate delivery of same," they meant to say "arrange to continue taking delivery from time to time according to the usual practice," as the last part of the sentence shows admittedly that they were not prepared to give immediate delivery of the balance of the bales under the contract. On the 9th of July, they wrote to the defendants in very much the same terms asking them to arrange to take immediate delivery of ninety-two bales that were remaining. Unfortunately the defendants did not reply to either of those letters. Nothing further was done until the 6th of October 1914 when the plaintiffs through their solicitors told the defendants that though they were unwilling to press them hard in those difficult times to take delivery of the ninety-two bales which had been lying undelivered for a long time they could not wait indefinitely for their convenience, and therefore they insisted upon knowing when the defendants proposed to take delivery of them and in the meantime whether they were prepared to pay some margin in respect of the goods. There were no deliveries during August and September; so that by the 6th of October the plaintiffs had been running into stock and had sufficient bales on hand to complete their contract with the defendants. The defendants sent no reply to that letter. On the 18th of January 1915, the plaintiffs' solicitors gave notice that if they did not hear by the 25th they would resell the goods on defendants' account by public auction. On the 10th of February, the goods were sold by auction realising Rs. 9,951-1-6 against the contract price of Rs. 14,946-1-6 leaving a difference of Rs. 4,995. The plaintiffs made a demand for this difference together with interest from the 1st of September 1914 to the 10th of February 1915 and godown rent and fire insurance making a total of Rs. 5,851-6-3 on the 16th of February 1915. On the 19th of February 1915 the defendants for the first time committed themselves to writing through their solicitors as follows:-You are aware

that the term of the contract was for delivery in October November 1913. Our clients were always ready and willing to take delivery of the bales, but as the goods were not ready your clients were not in a position to give delivery to our clients. It was only when the yarn market went down on account of the war your clients thought fit to manufacture the goods and called upon our clients to take delivery. Our clients were not bound to do so and repudiate their liability in the matter.

6. Now the plaintiffs claim clearly proceeds on the basis that the contract of the 18th of September 1913 remained in existence although as a matter of fact nothing was done under it during the contract period. If that is correct the plaintiffs can only succeed if the terms of the contract had clearly been altered by mutual consent. There is no evidence to show that this was done. After the end of November they may have considered that the contract remained in existence as altered by them, but the Court cannot say what was the altered contract. I think the proper view to take in this case is that this is a mercantile contract, and the Court can only read it according to the plain intention of the words in the written contract. Then, as the parties did nothing under the contract within the contract period, the written contract thereby came to an end. It was open to the parties to make a new contract on the basis of the old one by extending the period. But then the terms of the new contract must be certain before the Court can give any effect to them. It is impossible from the evidence for the Court to decide what were the obligations of the parties after the end of November. Within what period was delivery to be taken? Were the plaintiffs bound to have goods ready so that the whole contract could be completed? Were the defendants bound to ask for delivery? To all these questions no answers can be derived from the evidence; and so I think it must be taken that whenever after the end of November the defendants asked for delivery it was optional to the plaintiffs to give them delivery, and if they chose to give them delivery at the rates mentioned in the previous contract, that was a separate transaction; and the Court cannot imply from the plaintiffs having given delivery of five bales on the 3rd of December to the defendants, that the parties had entered into a new contract whereby the plaintiffs agreed to give delivery to the defendants of the remaining one hundred and ninety-five bales according as the defendants should choose to ask for them. Otherwise a very extraordinary state of affairs would result. Both parties would be sitting on the fence. If the market went against the defendants no one could say what their obligations as regards taking delivery were. If the market went against the plaintiffs no one could say what their obligations were as regards giving delivery. And I think one may be justified in saying that if after July the market had risen above the contract prices it would have been open to the plaintiffs to say that the contract was at an end just as now it is open to the defendants to say as the market has gone against them they are not obliged to proceed with taking further delivery. On the 9th of July, the plaintiffs had as a matter of fact only eighteen bales of 20 1/2s in stock, no bales of 20s.

They had other contracts on hand for sale of yarn. If business had been good, they would not have run into stock as they did by the beginning of October, and as a matter of fact on account of prices going down they found themselves with sufficient yarn on hand to cover the balance of the two hundred bales. It would be very strange although the plaintiffs were not ready to fulfil their contract in July that they should be entitled to continue to spin yarn, not against any particular contract and not against the defendants contracts, but simply because they had to keep the spindles running; and then, after the further lapse of four months to sell these ninety-two bales by auction and call upon the defendants to pay the difference. In my opinion, therefore, the claim for damages must fail.

7. There was a further question whether the plaintiffs had appropriated the ninety-two bales before the auction sale. Evidence of the Mill Manager and godown-keeper has been given to show that instructions were given to the godown-keeper to separate the ninety-two bales before the auction, and it may be necessary for me to say that I cannot disbelieve that evidence. Although there is no written record of it, it certainly was advisable that the goods should be appropriated to the contract before the auction sale as otherwise it would be open for the plaintiffs to sell ninety-two bales out of the larger quantity which was stacked together in their godown. But, as I have already stated, I am really doubtful that in any event the Mills were justified in their foundation for a claim for damages if they could not prove these goods had been manufactured for the defendants. It hardly seems fair that they should be entitled to manufacture goods without appropriating them and be at liberty to sell them, according as it might be profitable to them to any purchaser up to the last moment, and then before the auction separate them, and say that those were the goods intended to be delivered to the defendants. In the alternative, if the plaintiffs' case had succeeded, it might be a question whether they would be entitled to the difference between the contract prices and the prices in July 1914 or prices in October. Again, there would be another question, whether they would be entitled to the difference on thirty-one bales which they had in their godown on the 9th of July, or on the total amount of ninety-two bales which they had in stock by the 6th of October. But under my findings on the issues, I do not think it is necessary for me to answer those questions. The defendants will get their costs of the action.