Present : Schneider A.J.

1921.

MENDIS & CO. *v.* THE HOLLAND CEYLON COMMERCIAL CO.

151—C. R. Colombo, 76,844.

Sale of goods—Agreement to sell a certain quantity at a specified price—Agreement of seller with another person to supply the required quantity at a lower price—Refusal of buyer to accept delivery—Measure of damages.

Plaintiff entered into a contract with defendants to sell and deliver a certain quantity of desiccated coconuts at 27½ cents a pound. To cover his contract with defendants the plaintiff purchased from F at 19 cents a pound the quantity required. The defendants refused to take delivery of 2,730 pounds when F tendered the same. F refused to deliver the rejected quantity to the plaintiff. The plaintiff sought to recover from defendants as damages a sum of Rs. 232·05, being the profit which he might have made had the defendant not broken the contract.

Held, that the measure of damages is governed by section 48 (3) of the Sale of Goods Ordinance of 1896. The fact that plaintiff did not have the goods with him (owing to the refusal of F to deliver them to him), and that plaintiff could not, therefore, have re-sold the goods, did not render section 48 inapplicable.

THE facts appear from the judgment.

H. H. Bartholomeuez, for defendants, appellants.

Samarawickreme, for plaintiff, respondent.

1921.

October 18, 1921. SCHNEIDER A.J.

Mendis & Co. v. The Holland Ceylon Commercial Co.

By a contract in writing dated March 25, 1920, the plaintiff sold to the defendants at the rate of 27½ cents per pound 200 cases of desiccated coconut, each case to contain 130 pounds. Delivery was to be made during the months of April and May, and to be completed by May 20. To cover his contract with the defendants the plaintiff purchased from Messrs. Fradd & Co. at 19 cents per pound the same quantity of the goods as that which he had sold to the defendants. He stood, therefore, to make a profit of 8½ cents per pound. The defendants wrongfully refused to take delivery of 21 cases, containing 2,730 pounds, of the goods sold to them. For this breach of their contract the plaintiff in this action sought to recover a sum of Rs. 232·05, or the profit which he might have made had the defendants not broken their contract. In their answer the defendants pleaded that the damages which the plaintiff was entitled to claim should not exceed Rs. 91. It is impossible from the answer to collect upon what basis this sum had been arrived at. Having regard to the pleadings alone, it is quite evident that the parties were at issue as to what should be the measure of damages; and that the plaintiff claimed as damages the profit he might have made, and the defendants resisted this claim without pleading what should be the measure of the damages. The issue framed was what damage has the plaintiff suffered ?

In my opinion the issues should have been :—

(1) What should be the measure of damages ?

(2) What sum is the plaintiff entitled to as damages ?

The learned Commissioner gave judgment for the plaintiff for the sum claimed by him, but not as loss of profit as claimed in the plaint. He thought that section 48 of the Sale of Goods Ordinance, No. 11 of 1896, had no application, inasmuch as the plaintiff had no opportunity of selling the 21 cases of desiccated coconut in the open market, because Messrs. Fradd & Co. refused to deliver them to the plaintiff himself in consequence of the refusal to accept on the part of the defendants.

On appeal, Mr. Bartholomeusz, for the defendants-appellants, contended that the measure of the damages is governed by the provisions of section 48 (3) of the Sale of Goods Ordinance of 1896. This contention appears to me to be right. I am unable to agree with the learned Commissioner that section 48 does not apply because the plaintiff did not have the goods, and therefore could not re-sell them and thereby mitigate the damages.

It is true that Messrs. Fradd & Co. refused to make delivery of the rejected goods to the plaintiff, and that their refusal was in consequence of the act of the defendants in refusing to take delivery when tender was made. But that fact cannot operate to render the provisions of section 48 inapplicable. That was an ulterior and

remote consequence arising from an event subsequent to the breach for which the defendants had not contracted to be liable. It seems to me, therefore, upon the facts as proved, the measure of damages should be the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted according to the time fixed for acceptance. I am unable to determine the amount of damages upon the evidence on record. The precise date of the breach is not given by the plaintiff nor by the defendants. From some evidence called by the defendants they seem to have regarded the breach as having been committed in May, 1920, but, on the other hand, their own document D 1 points to the breach as having been made in April.

The decree must be set aside, inasmuch as the measure of damages as claimed by the plaintiff, and as adopted by the Commissioner, are both wrong. The case must go for re-trial, because the facts necessary for assessing the damages have not been proved.

Mr. Samarawickreme, while admitting that the plaintiff could not in the circumstances of the case claim the profits he might have made, sought to uphold the judgment upon the ground that the case fell within the provisions of section 18, rule 5, of the Sale of Goods Ordinance. He contended that the property in the goods had passed to the defendants, in that the goods had been unconditionally appropriated to the contract with the implied assent of the buyer, and that the seller was entitled to maintain an action for the price of the goods, but that in this case the plaintiff had obtained judgment only for a part of that price. I am not certain that the argument is sound, but I need not consider it, as the plaintiff's action is not for the recovery of the price or part of the price of the goods, but for recovery of the profit which he has been deprived of making. If the plaintiff desires to make his claim upon that footing, he would have to re-cast his action. Such an alteration of the claim might give rise to a claim for the delivery of the goods or other defences. I cannot uphold the decree on the ground put forward by Mr. Samarawickreme. Whether in the circumstances the plaintiff should be permitted to re-cast his claim is a question which should be raised and decided in the lower Court.

I set aside the decree and remit the case for assessment of damages according to the measure I have indicated, unless the plaintiff is allowed to amend his plaint and the action has to be decided upon other issues. The costs of the trial already had and of this appeal will follow the order as to costs, which would be finally made by the Commissioner, or by this Court in the event of a second appeal.

Sent back.