1958 *Present:* **Weerasooriya, J., and H. N. G. Fernando, J.**

ROMANIS, Appellant, *and* SHERMAN DE SILVA & CO., LTD. Respondent

S. C. 225—D. C. Colombo, 24,834

Sale of Goods Ordinance (Cap. 70)—Section 50 (2) (3)—Non-delivery of goods—Available market—Measure of damages—Relevancy of a contract for sub-sale.

In assessing damages for non-delivery of goods under a contract of sale where there is an available market, the Court will not take into account an intermediate contract entered into with a third party for the sub-sale of the goods. The fact that the buyer under the sub-contract claims no damages for non-delivery to him is not a good ground for awarding as damages to the buyer under the main contract anything less than the full difference between the contract price and the market price at the date of the breach. To adopt the market price as the measure of damages in such circumstances, irrespective of any dealings in regard to the goods which the buyer may have had with a third party, is not in conflict with sub-section 2, and is in accordance with sub-section 3, of section 50 of the Sale of Goods Ordinance.

APPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam, Q.C., with *J. M. Jayamanne* and *T. Parathalingam*, for defendant-appellant.

N. K. Choksy, Q.C., with *V. A. Kandiah*, for plaintiff-respondent.

Cur. adv. vult.

January 27, 1958. WEERASOORIYA, J.—

This action was filed by the plaintiff-respondent claiming from the defendant-appellant the sum of Rs. 77,862 as damages for breach of a contract dated the 21st April, 1950, (P6), under which the defendant had

bound himself to supply to the plaintiff on or before the 31st December, 1950, 10,000 lbs. of No. 1 white grade papain at Rs. 6·75 per lb. The contract also provided for the goods being delivered by the seller in air-tight tins and "guaranteed on landing at New York" to be equal in quality to a specified sample.

The plaintiff is a limited liability company. The evidence indicates that the plaintiff required the papain for sub-sale to one or more buyers in New York, and that the defendant was so informed at or about the time of the contract. It is common ground that out of the contract quantity only 4536 lbs. were made available to the plaintiff at Rs. 6·75 per lb. The damages sued for are claimed in respect of the balance 5464 lbs. computed on the difference per lb. between the contract price and the sum of Rs. 21 said to represent "the current available market rate" at which the goods could have been obtained after the 31st December, 1950.

Two defences were taken by the defendant to this claim in his answer. The first defence is that the contract as embodied in P6 was subject to a "contemporaneous separate oral agreement constituting a condition precedent to the attaching of any obligation under such contract", and that such separate oral agreement provided, *inter alia*, that should the market price of the goods rise above Rs. 6·75 per lb. the contract price would be increased by a corresponding amount in respect of any quantity over and above 6000 lbs. The case for the defendant on this defence is that as he knew that he would be able to supply only about 6000 lbs. of papain from his own plantations he safeguarded himself against loss from any unexpected rise in the market price in respect of the balance (which he would necessarily have to obtain from other sources) by insisting on this stipulation which, though not reduced into writing, he said was accepted on behalf of the plaintiff by Mr. N. R. de Silva, one of the directors of the plaintiff, firm ; that the market price subsequently rose from Rs. 6·75 per lb. to Rs. 15·50 per lb. but the plaintiff failed and neglected to comply with the terms of the oral agreement as regards payment and was therefore precluded from maintaining the present action.

The second defence is that in any event "the contract sued on stood rescinded, abandoned and was otherwise concelled in or about the 22nd September, 1950", that there was substituted in its place a fresh contract between the parties (which too was not reduced into writing) whereunder the plaintiff agreed to pay Rs. 6·75 per lb. for papain produced from the defendant's own property and Rs. 15·50 per lb. for papain obtained by him in the local market for supply to the plaintiff and that the plaintiff failed to take delivery of part of the goods tendered under this new contract.

After trial the learned District Judge rejected both these defences as false, and he gave judgment for the plaintiff in a sum of Rs. 56,006 with costs. From this judgment the defendant has filed the present appeal. Although one of the grounds of appeal is that the trial Judge was wrong in rejecting the first of these defences, Mr. Thiagalingam who appeared for the appellant stated at the hearing before us that he was not pressing that ground. As regards the rejection by the trial Judge of the second defence, after Mr. Thiagalingam had concluded the appellant's case we

saw no reason to take a different view from that of the trial Judge whose findings of fact having a bearing on that defence are amply supported by the evidence. We accordingly intimated to Mr. Choksy who appeared for the plaintiff-respondent that we did not wish to hear him except on the questions of law and fact appertaining to the issue of damages, those being, in our opinion, the only substantial matters arising for decision in this appeal.

In awarding the sum of Rs. 56,006 as damages the trial Judge went on the basis that section 50 (3) of the Sale of Goods Ordinance (Cap. 70) applied to this contract. He held that Rs. 17 per lb. fairly represented the market or current price of the goods in December 1950 or January 1951 being the time when, in his view, the plaintiff should have started buying against the contract, and he gave the difference per lb between that price and the contract price on the shortfall of 5464 lbs. Mr. Thiagalingam strenuously contended that the evidence in the case did not justify a finding that there was an available market for the goods in December 1950 or January 1951 or subsequently. But on this point there is not only the evidence of the witness Pilapitiya, to which the Judge has specifically referred in his judgment, but also the evidence of the defendant himself that there was enough papain in the market in December 1950 and January 1951 and that the price was Rs. 15 and Rs. 15·50 per lb.

Mr. Thiagalingam next contended that even if there was an available market at which the plaintiff could have obtained the goods when the defendant defaulted in delivering the balance quantity under the contract, the learned trial Judge was wrong in having recourse to section 50 (3) of the Sale of Goods Ordinance in the special circumstances of this case. Before I deal with the submissions of Mr. Thiagalingam on this aspect of the case it will be necessary to refer briefly to such evidence as there is in regard to the destination of the goods purchased under the contract P6 and the position of the plaintiff *vis a vis* the American buyers.

Mr. Sherman de Silva, the managing director of the plaintiff company, stated that the plaintiff was under contract for the supply to at least one American buyer of 8000 lbs. of the same grade of papain as formed the subject matter of the contract with the defendant. He also stated that at the time when the defendant defaulted in the performance of his contract P6 the plaintiff had already supplied to the American buyer about 4000 lbs. under the sub-contract, representing almost the entire quantity which the defendant had given the plaintiff. This included 700 lbs. purchased by the plaintiff from the defendant outside the contract P6 on the 2nd October, 1950, at Rs. 15·50 per lb. which according to Mr. de Silva was the prevailing local market price and which he consented to pay as a special favour in order to enable the defendant to minimise to some extent his losses under the contract P6. Mr. de Silva said that after the defendant defaulted attempts were made by the plaintiff to obtain the shortfall from other quarters but no papain was available until the 26th June, 1951, when the plaintiff entered into the contract P28 with Pilapitiya for the supply of 3000 lbs. No. 1 white grade papain at Rs. 21 per lb. The plaint filed in this case is dated the 27th June, 1951, and

the amount claimed as damages represented the difference between Rs. 21 and Rs. 6·75 on 5464 lbs. Mr. Thiagalingam suggested that the contract P28 was a bogus and collusive transaction intended to bolster up the claim for damages made in the plaint. But although Pilapitiya was called as a witness for the plaintiff and stated that the full quantity mentioned in P28 was supplied by him to the plaintiff and that he received payment at the rate of Rs. 21 per lb. he does not appear to have been cross-examined on the basis that the transaction was other than a genuine one.

While according to Sherman de Silva he was not able to obtain supplies of the required grade of papain in the local market until June 1951, the evidence of Pilapitiya and the defendant (to which reference has been made earlier) is that supplies were available in the local market in December 1950 and January 1951. Sherman de Silva's evidence as regards the availability of supplies and also the need for entering into the contract P28 is conflicting and unsatisfactory. At first he stated that the 3000 lbs. purchased from Pilapitiya were despatched to New York to fulfil the plaintiff's outstanding obligations under the contract with the American buyer. On a subsequent occasion he appears to have taken up the position that all that was sent to the American buyer was only such quantity as was made available to the plaintiff by the defendant prior to the latter's default, namely about 4000 lbs.; and as regards the balance quantity due under the sub-contract, he said that although requested by the plaintiff to purchase it elsewhere against the sub-contract the American buyer was unable to do so, and he did not, therefore, make any claim on the plaintiff for damages.

Mr. Thiagalingam submitted that on this evidence he was entitled to ask the Court to hold that the plaintiff in fact sustained no damages at all by reason of the defendant's default or, if the plaintiff suffered any damages, they were only in respect of the 700 lbs. purchased at the special rate of Rs. 15·50 per lb. He urged that since sub-section 3 of section 50 of the Sale of Goods Ordinance is only a *prima facie* application of the principle laid down in sub-section 2, the evidence of Sherman de Silva enables the Court to estimate in terms of sub-section 2 the loss directly and naturally resulting, in the ordinary course of events, from the defendant's breach of contract without recourse to the method adopted in sub-section 3 of assessing the damages on the difference between the contract price and the market price.

In short, according to learned counsel for the defendant-appellant, in the assessment of the damages to which his client became liable by reason of the breach of contract, the position between the plaintiff and the American buyer in regard to the sub-contract is an extremely relevant consideration. But it seems to me that notwithstanding a degree of plausibility in the arguments adduced by Mr. Thiagalingam, the question of damages has to be answered in the light of certain English decisions which were brought to our notice in the course of the argument and to which I shall refer presently. Section 50 of the Sale of Goods Ordinance, I may state, is in the same terms as section 51 of the English Sale of Goods Act, 1893.

The leading English case as to the assessment of damages for non-delivery of goods under a contract of sale where there is an available market is *Rodocanachi v. Milburn*[1], and the following passage from the judgment of Lord Esher, M. R., in that case has been repeatedly adopted as correctly stating the law on the point: "It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods". In *William Brothers v. Edward T. Agius Ltd.* [2] the facts, in so far as relevant for the purpose of the present case, were that a cargo of coal had been sold forward at 16s. 3d. a ton and the buyer in the expectation of the contract being performed entered into a contract with a third party for the sale of similar goods at 19s. a ton. The seller defaulted under the main contract and the market price at the date of the breach was 23s. 6d. The contention on behalf of the seller that the true measure of the buyer's damages for non-delivery was the difference between the contract price (16s. 3d.) and the price at which the goods were re-sold (19s.) and not the difference between the contract price and the market price (23s. 6d.) was rejected by the House of Lords which approved the decision in *Rodocanachi v. Milburn* (*supra*). Again, in *Slater v. Hoyle & Smith Ltd.* [3] the Court of Appeal, following the decision in *Rodocanachi v. Milburn* (*supra*), held that the fact that no damages had been claimed by the buyer under the sub-contract for non-delivery was not a good ground for awarding as damages to the buyer, in respect of his seller's breach of contract, anything less than the full difference between the contract price and the market price at the date of the breach.

Mr. Thiagalingam relied strongly on the opinion of the Privy Council delivered by Lord Atkinson in *Wertheim v. Chicoutimi Pulp Co.* [4] as departing from the rule laid down in *Rodocanachi v. Milburn* (*supra*). But it is to be noted that in Lord Atkinson's own speech in the House of Lords in *Williams Brothers v. Edward T. Agius Ltd.* (*supra*) he distinguished the two cases on the ground that the one (Wertheim's case) dealt with a claim for damages for late delivery of goods while the other (Rodocanachi's case) was a claim for damages for non-delivery. Referring to the latter case, Lord Atkinson stated that as an authority it "has been many times recognised and never questioned". As observed, however, in Benjamin on Sale (8th edition, page 964) it is difficult to reconcile Wertheim's case with the principle of Rodocanachi's case, and in *Slater v. Hoyle & Smith Ltd.* (*supra*) the Court of Appeal seemed to be of the opinion that Wertheim's case was wrongly decided.

Having regard to these decisions I am unable to accept the contention of Mr. Thiagalingam as to the measure of damages. The trial Judge has found that there was an available market for the goods at the relevant time. I see no reason to disturb this finding. Applying the decisions which I have discussed (other than Wertheim's case) to this finding it is clear that the measure of damages should be the difference between

[1] *(1888) 18 Q. B. D. 67.*
[2] *(1914) A. C. 510.*
[3] *(1920) 2 K. B. 11.*
[4] *(1911) A. C. 301.*

the market price and the contract price and the fact that plaintiff's American buyer has made no claim against the plaintiff for damages is not relevant to the question of damages as between the plaintiff and the defendant. I do not think that a decision of the case on these lines involves any conflict between sub-sections 2 and 3 of section 50 of the Sale of Goods Ordinance. As observed by Salter, J., in *Patrick v. Russo-British Grain Export Co., Ltd.*,[1] when a seller of goods fails to deliver he should pay to the buyer the value of the goods at the time when they should have been delivered. This, it appears to me, is the normal measure of damages even on the basis of sub-section 2 of section 50 of the Sale of Goods Ordinance. Again, as stated by Salter, J., in the same case, if at the date of the breach there is an open market for the goods then the market price is obviously their value to the buyer. To adopt the market price as the measure of damages in such circumstances, irrespective of any dealings in regard to the goods which the buyer may have had with a third party, is in my opinion not in conflict with sub-section 2 and is in accordance with sub-section 3.

Yet another consideration is that when there is a market for the goods no question of the buyer's loss of profit on the re-sale can arise as it is always open to him to fulfil his obligations under the re-sale and secure his profit by buying the goods in the market. If in such a case the buyer is not entitled to recover damages from a defaulting seller according to the higher profit on the re-sale, but is confined to the market price, it seems unjust, said Lord Esher, M. R., in *Rodocanachi v. Milburn* (*supra*) that where the re-sale price is less than the market price the re-sale price should govern the case.

Apart from the decisions considered above, Mr. Thiagalingam referred us to several other authorities where in the assessment of damages the price on the re-sale was not regarded as immaterial. But it is not necessary to deal with them individually as they are all cases where there was no available market. Obviously in such a situation a Court would have to look at such other circumstances relating to the entire transaction as would enable the value of the goods to the buyer being ascertained, and a re-sale price may, but not always, be evidence of such value. The decisions in those cases cannot, therefore, be taken to apply to a case where there is an available market for the goods.

There remains to be considered the amount of damages which the plaintiff is entitled to on the basis of the difference between the market price and the contract price. In fixing the market price in December 1950, or January 1951, at Rs. 17 per lb. the trial Judge went on certain evidence given by the witness Pilapitiya, but from the extracts of his evidence which have been quoted in the judgment of the trial Judge it would seem that Pilapitiya was by no means definite that the price at the time was Rs. 17 per lb., seeing that he has also specifically stated that the price in January 1951 may have been less than Rs. 17, while earlier he had said that in the same month the price was about Rs. 15 and started moving up to about Rs. 20 in June. That the price in January 1951 was about Rs. 15 per lb. is also the evidence of the defendant.

[1] *(1927) 2 K. B. 537.*

I do not think, therefore, that the trial Judge was justified on this evidence in fixing the market price in January 1951 as high as Rs. 17, and I fix it at Rs. 15 per lb. The plaintiff would then be entitled in damages to the difference between Rs. 15 and Rs. 6·75 (the contract price) on 5464 lbs., that is to say, a sum of Rs. 45,078, which figure will accordingly be substituted for the sum of Rs. 56,006 awarded as damages in the judgment and decree of the Court below. Subject to this variation the appeal will stand dismissed, but as the defendant-appellant has succeeded in obtaining a substantial reduction in the damages he will have half his costs of appeal paid by the plaintiff-respondent.

H. N. G. FERNANDO, J.—I agree.

Decree varied.