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Present : Bertram C.J. and De Sampayo J.

FERNANDO *v.* SUBRAMANIAM *et al.*

46—*D. C. Kalutara*, 8,386.

Damages—Breach of contract—Goods sold against defendant—No market for goods at time of breach—Sale after some time—Claim of difference between contract price and price realized.

Defendant contracted to buy thirty leaguers of arrack, but refused to take delivery of a portion. The plaintiff gave formal notice that he would sell against him. The notice expired on July 16. The arrack was sold in September. The plaintiff claimed the difference between the contract price and the price realized. There was no actual market for arrack in July, and it was difficult to find purchasers for the arrack in question.

Held, that plaintiff was entitled in the circumstances to the full amount of the difference in price.

THE facts appear from the judgment of the District Judge (Allan Beven, Esq.):—

The plaintiff, who is a renter and wholesale dealer in arrack, alleges that he entered into a contract with defendants on May 23, 1918, to supply them with 30 leaguers of arrack at Rs. 180 a leaguer, and they agreed to receive the same. The defendants admit they received 13 leaguers of arrack and paid plaintiff for the same, but deny that they

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entered into any agreement to accept 30 leaguers from him. In proof of this they produce a writing dated May 23, 1918 (D 1), in which plaintiff promises to supply them with 30 leaguers of arrack at Rs. 180 per leaguer, but they contend that there was no obligation on their part, either expressed in writing or tacit, to accept the same. But plaintiff has proved by the witness Sinniah, who acted as broker for defendants, and introduced first defendant to him at the Council Chamber at the sale of rents, that he (first defendant) agreed to take 30 leaguers. The same day Sinniah took plaintiff to Hulstsdorp to get Rs. 2,000 in advance from first defendant, who said he had no money, but asked him to come next day. But first defendant was so anxious to bind plaintiff to his contract that he took the writing D 1 from him. This document is very cautiously worded, and put no obligation on defendants to accept the arrack. At that time the arrack market was rising, but evidently was in a state of fluctuation. On May 27 and June 5 plaintiff delivered 975 gallons, equivalent to 13 leaguers, for which he was paid. According to Sinniah's evidence, the price of arrack went down after the last delivery by plaintiff, though plaintiff states it kept between Rs. 180 and Rs. 190 for 15 days after the contract was entered into. The plaintiff states that defendants would not take the balance arrack, because they had no money at the time, nor enough vessels to store it. So, even if the price kept steady for 15 days, defendants were not in a position to take delivery.

The first defendant has gone into the witness box to repudiate the contract which was made with him previously (*vide* D 1), but second defendant gives as a reason for not accepting the balance arrack, that it was not quite up to the standard of the previous instalments delivered. I have no doubt in my mind that defendants intended taking over all the arrack (30 leaguers), but they were not in a position to do so for want of vessels and funds. Then they found the market falling and repudiated the contract, on the ground that there was no obligation on them to accept it.

Plaintiffs sent defendants a letter of demand (D 2) on July 8, and received reply (P 1) repudiating the contract. Plaintiff, thereafter, sold the arrack at Rs. 105, and is now claiming Rs. 1,500 damages.

I give judgment for plaintiff for Rs. 1,360, with costs.

At the second hearing the District Judge (J. C. W. Rock, Esq.) delivered the following judgment :—

This case is sent back for inquiry as to what was the market price in July, 1918, or rather after July 16. Plaintiff called evidence to show that the price was Rs. 100 or Rs. 110 per leaguer. One Pieris, manager of Mr. R. E. S. de Soysa, gave evidence to this effect, but said that the credit price might be Rs. 170 or Rs. 180. The witness Warlianu Fernando, however, does not give unequivocal support to this statement. In fact, his evidence was rather evasive, and when I questioned him, it came out quite involuntarily that—to use his own words—“in July wholesale godown keepers sold arrack for Rs. 160 and Rs. 180 ready cash.” He tried afterwards to amend this statement, but it seems to represent the truth. Defendant called a witness, who produced his account book (D 3) to show that Rs. 180 was the price paid to godown keepers on July 30, and, in fact, to Pieris' employer arrack was sold at Rs. 170. Neither plaintiff nor Pieris produced any books, and taking

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the evidence of defendant's witness with that of Warlianu, it appears to me that it was possible to get Rs. 180 a leaguer in July. Plaintiff was probably more intent in pursuing damages from defendant than on selling. There was no appreciable fall in the price of arrack, and therefore plaintiff is not entitled to recover any damage. Plaintiff should pay costs of appeal and of this inquiry.

A. St. V. Jayawardene, K.C. (with him *F. de Zoysa*), for appellant.

Pereira, K.C. (with him *Amarasekera*), for respondents.

January 12, 1922. BERTRAM C.J.—

This is a case which is far from easy to decide. It has already been before this Court, and was sent back for further inquiry in the District Court. Our difficulties are due to the fact that that inquiry has not been so close and searching as it ought to have been. The question arises on the sale of certain arrack. The contract was for the sale of thirty leaguers of arrack at Rs. 160 per leaguer ; and thirteen leaguers were delivered under that contract, after which the defendant repudiated it. For some time the plaintiff took no actual step to make the defendant responsible ; but finally he gave him formal notice that he would sell against him. He did not, however, sell against him immediately. The notice expired on July 16 ; the arrack was disposed of in September, and the plaintiff claimed the difference between the contract price and the price realized.

When the matter came before this Court, it was thought that the measure of damages had not been properly estimated. The case was sent back, so that inquiries might be made as to what was the market price on July 16, and the Court below applied itself to that question. The evidence tendered by the plaintiff went to show that there was no actual market for arrack at the time in question. Most of the arrack dealt with had already been contracted for, and it was said that in the latter part of July there was no demand for additional arrack, and that it was very difficult to find a purchaser for the arrack in question, the only sales being sales direct from distilleries. One witness, on examination by the Judge, made a series of remarks, which appear to be absolutely unintelligible. One of these remarks was to the effect that in July arrack was disposed of at Rs. 160 and Rs. 180 per leaguer. On the other side the manager of Mr. P. C. H. Dias was called, and he produced a book showing that in the course of the month of July transactions were entered at Rs. 180 per leaguer.

Now, the position is really this. The case went back to the Court below for inquiry as to the market price of arrack in the latter half of July. The question is, Has any market price been proved ? Certainly the plaintiff has not proved the existence

of any market price. The question is, Does the production of Mr. P. C. H. Dias's books show the ruling market price? It seems to me that the book is inadequate for the purpose. It is not stated whether the sales of arrack referred to were sales of surplus arrack as ordinary market transactions, or whether they were sales in pursuance of a contract or some understanding. One of them is a sale by Mr. Dias himself to the Four Korales renters, of whom he himself was one. On the other side of the book are numerous entries showing that Mr. Dias himself purchased from various distillers arrack at a much lower price, and the evidence called by the plaintiff, in particular that of Mr. Pieris, the manager of Mr. R. E. S. de Soysa, seems to suggest that these sales were sales in the ordinary course of business. It does not seem to me, therefore, that the production of this book by Mr. Dias does prove anything in the nature of a ruling market price, and I see no reason why we should not act upon the evidence of Mr. de Soysa's manager.

If we accept these facts, the case is exactly on all fours with the case of the *Dunkirk Colliery Company v. Lover*,¹ which was the case of a coal contract, where the defendant repudiated the contract, where there was no market for the coal thus thrown on the hands of the seller, and where he tried to find another purchaser according to the ordinary course of his business, and after several failures sold the coal at a much lower rate than that contracted for. It was there held that the plaintiffs were entitled to the full amount of the difference between the contract price and that which they obtained. On that principle I think it must be taken that the result of the inquiry really is that there was no market price, and I think that, under the circumstances, the plaintiff is entitled to the damages originally awarded. I would, therefore, allow the appeal, with costs.

DE SAMPAYO J.—I agree.

Appeal allowed.

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