

Present : Fisher C.J. and Garvin J.

1959

GORDON & GOTCH, LTD. v. RODRIGO *et al.*

258—D. C. Colombo, 23,595.

Principal and agent—Indent for goods—Disclosed firm—Request to purchase goods on stated terms—Breach of contract—Action on bills by agent.

Where the defendants requested the plaintiff company to purchase for them on their account and at their risk certain goods and to draw upon them for the amount of the invoice which included the value of the goods and commission,—

Held (in an action by the plaintiff company on the bills drawn by them upon the defendants and accepted by the latter), that the relationship between the plaintiff company and the defendants was that of agent and principal, and that it was not open to the defendants to plead as a defence that the goods were not in accordance with the terms of the indent.

THIS was an action by the plaintiffs to recover the amount due on certain bills drawn by them and accepted by the defendants. They were drawn in pursuance of an indent for goods supplied by the plaintiff company at the request of the defendants. It was pleaded in defence that the bills were accepted in the belief that they were drawn in respect of goods shipped in accordance with the terms of the contract, and that the plaintiffs having failed to do so, the defendants were not liable to pay any sum on the said bills to the plaintiffs. The learned District Judge gave judgment for the plaintiffs.

H. V. Perera, for defendants appellant.—In the present case the appellants had nothing whatever to do with the foreign supplier. The plaintiffs stated that they would supply the appellants with grapes from Mr. Cordero, and that in the event of any dispute between the plaintiffs and the appellants the plaintiffs would submit to arbitration. So that the plaintiffs undertook the obligations of a vendor.

The plaintiffs having agreed to buy and deliver goods at a future date at a fixed price, the mention of the name of the person from whom they are to be bought is immaterial.

Another test would be: Are the plaintiffs affected or not by the fluctuations of the price. If they are not, then they are not agents, although the document refers to their remunerations as a "commission"; it is really their profit.

The preliminary clause where the defendants request the plaintiffs to purchase on their behalf is not conclusive of the legal position of the parties because it says "on the terms mentioned below." A reference to the terms makes it clear that plaintiffs are principals.

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H. H. Bartholomeusz (with *N. K. Choksy*), for the plaintiffs, respondent.—The true construction of the whole document is that the plaintiffs were to place the order in those terms with the supplier indicated in the contract (*Francisco Perez Cordero*). If the appellants prove that the plaintiffs have failed to do so they may have a claim for damages for breach of that duty as agents. The goods were grapes in Spain, the plaintiffs are in England, and neither party contemplated that the plaintiffs were to ship.

The bills of lading were made out in the name of the plaintiffs, but that was to give them control of the goods so that they may exercise their rights as, *e.g.*, the right of stoppage *in transitu*.

Even if it be held that the plaintiffs agreed not only to purchase but themselves to ship the goods, the defendants were not entitled to repudiate the contracts, because the plaintiffs were only agents, and the defendants would only have been entitled to claim damages as for the breach of duty as agents. The plaintiffs were not called upon to prove that the goods were shipped fortnightly, because the basis of the defence was that defendants were entitled to repudiate the whole contract as plaintiffs were vendors and had failed to ship according to time, and not that the plaintiffs, *as agents*, had failed to perform a duty.

The arrival of the goods quicker than fortnightly is not proof that they were not shipped fortnightly, as provided for.

The fact that the price was fixed does not alter the position. The commission agent, in the case of a contract on C.I.F.C.I. terms, gets a C.I.F. quotation from the foreign supplier, adds on his commission and the interest, and quotes that to the local indenter, who accepts it. In such a case the fact that the price is fixed does not alter the character of the relationship between the parties. Furthermore, in such a case there can be no risk of a fluctuation of the market price, as the contract price is already ascertained and fixed beforehand.

Counsel cited *Ireland v. Livingstone*,¹ *Cassaboglou v. Gibbs*,² *Ebrahim Parikhan v. Scheller Dosogne & Co.*,³ *Meredith v. Abdulla Sahib & Co.*⁴ This case is exactly in point.

H. V. Perera (in reply).—Our defence of a set-off is on the basis of a breach of duty as well, in that the plaintiffs had failed to ship the goods in accordance with the terms of their agency. There was also another breach of duty alleged, namely, that the plaintiffs had shipped rotten grapes instead of "golden" grapes.

¹ 27 L. T. R. 79.

² 48 L. T. R. 850.

³ 13 Bom. 470.

⁴ 41 Mad. 1060.

[GARVIN J. observed that that was not the basis of the defence, which was that the plaintiffs were vendors—not agents. In view of this difference, the plaintiffs were not called upon to meet it. As they alleged themselves to be agents, such a claim they contend, could only be made against the principal, Cordero.]

Our position is that on this question the plaintiffs' liability is the same as that of the vendor.

[GARVIN J. pointed out that the measure of damages would be different in the two cases. If appellants had pleaded a breach of duty *qua* agents they would have had to meet an entirely different case.]

Whatever label is given, we are entitled to prove, upon the pleadings and the document plaintiffs are relying upon, that plaintiffs had failed to carry out their obligations to ship according to the terms of the document. It would make no difference in what light they were regarded.

February 27, 1929. FISHER C.J.—

In this case the defendants sent the plaintiffs an indent in the following terms :—

Indent No. 075.

K. Sathasivam.

Colombo, September 15, 1925.

From Rodrigo and Fernando, 13, Hill street, Colombo.
To Messrs. Gordon & Gotch, Ltd., London.

GENTLEMEN,—I/WE hereby request you to purchase for me/us (if possible) the under-mentioned goods on my/our account and risk upon the terms stated below.

It shall be optional with you to execute the whole or any part of this, order.

If any dispute arise with regard to this order, two European merchants resident in Colombo, to be nominated to survey the goods, whose decision shall be final, and I/We hereby agree to abide by such decision. Expenses of such survey to be borne by the losing party.

Terms of Payment : I/We authorize you to draw upon me/us for the total amount of invoice at the sight mentioned below, at current rate of exchange, and such bill or bills, I/We hereby bind myself/ourselves to accept on presentation and pay at maturity.

In the event of the goods arriving before the bills become due, I/We agree to retire the same.

Should I/We fail to accept or to pay at maturity such bill or bills I/We hereby authorize you or whomsoever you may appoint to dispose of the documents or goods either by private sale or public auction on my/our account and risk, and hereby bind myself/ourselves to make good any loss or deficiency that may arise from such sale and expenses, together with usual brokerage and interest, and your further commission of five per cent. waiving all claims to any advantage thereon. And further I/We agree to accept your invoices as correct and that the same may be used in any Court or Courts without further proof. Deliveries

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may be suspended pending any contingencies beyond the control of sellers or agents (such as strikes, lock-outs, fire, accidents, war, stoppage of navigation, or the like). The failure of one delivery not to vitiate the contract as to others. The terms and conditions of this indent have been fully interpreted and explained to me.

Marks.	Limits of Time and Route.	Commission.	Usance of Bills and Name of Bank.
075 ..	Per steamer	.. Per cent.	.. Three days sight

Messrs. Francisco Perez Cordero, Almeria.

100 barrels, every two weeks, golden grapes, during the season as usually shipped to Colombo.

Each barrel to weigh 21 kilos nett.

Price at 23/8d. per barrel C.I.F.C.I. Colombo (as per your cable).

Shipment : 100 barrels every two weeks during the season.

In accordance with the indent four bills of exchange were drawn by the plaintiffs and accepted by the defendants, and the plaintiffs sue to recover the amount due on the said bills. The defendants plead (paragraph 5 of the answer) "that they accepted the said bills when presented, believing that the said bills were drawn in respect of goods shipped in accordance with the terms of the contract, and as the plaintiff company failed and neglected to ship the goods in accordance with the said contract the defendants did not become liable to pay any sum on the said bills to the plaintiff company."

The short point for decision on this appeal is whether on the true construction of the indent the relationship between the defendant firm and the plaintiff company is that of vendor and purchaser or agent and principal. In my opinion it is quite clear that the relationship was that of agent and principal. The words of the opening paragraph are very specific, and there is nothing in the remainder of the indent to indicate any intention of the parties to alter or modify the relationship which those words so clearly established. Brett M.R. in his judgment in *Cassaboglou v. Gibb*,¹ said "It is obvious to my mind that the contract of principal and agent is never turned into a contract of vendor and purchaser for the purpose of settling the damages for the breach of duty of the agent." Those words seem to be in point in this case.

In my opinion the judgment of the learned judge must be affirmed and the appeal dismissed with costs. In view, however, of the consent given at the trial and repeated in this Court by Counsel for the respondent, the appellant firm, if so advised, will be at liberty to bring an action for damages against the respondent based on any default of which they may allege that the respondent company was guilty in its duty as an agent.

GARVIN J.—I agree.

Appeal dismissed.

¹ 11 Q. B. D. 797.