Present: Ennis J. and Loos A.J.

1920

CAMPBELL & CO. *v.* WIJESEKERE.

101—D. C. Colombo, 47,033.

Prescription Ordinance, ss. 7, 8, and 9—Action for goods sold—Written contract—Repudiation of contract—What constitutes repudiation?

Section 9 of the Prescription Ordinance, 1871, does not apply to a contract of sale made in writing and signed by the parties; it applies to an unwritten contract, which can be enforced by an action owing to the goods having been delivered.

THE facts appear from judgment of the District Judge (P. E. Pieris, Esq.):—

The defendant in this case, who is carrying on business in Colombo, entered into certain agreements with the plaintiffs, a trading firm in the city of London, by which he undertook to supply them with a quantity of Ceylon copra and coconut oil. The defendant delivered a certain proportion of these goods, but the plaintiffs complain that by his cables of May 19 and 22, 1916, he refused to abide by his contract or make further shipments thereon, and they claim from the defendant a sum of £3,575 as damages.

The defendant, subject to an admission of liability in respect to an item of £24. 5*s*. which need not be discussed at this stage, denies that there has been a breach of his agreement. He avers that the cables were despatched by him merely with a view to making arrangements for a re-sale, that negotiations for a re-sale were carried on till June 2, 1916, when the defendant, finding that the parties could not agree, intimated to the plaintiffs that he would ship the balance due; the plaintiffs refused to accept such balance.

The limit of time fixed under the agreement had expired long before the despatch of the cables. The defendant says that that the time had been extended by the plaintiffs, who are not prepared unqualifiedly to admit the alleged extension. For the moment it may be assumed that there was such an extension. The main question to decide is what is the meaning to be attached to the two cables, and what was their effect . . . .

It is abundantly evident from the documents which, so far, have been discussed that this was not the intention of the defendant when he sent the telegrams P 1 and P 2. Those telegrams were meant to be an express declaration of default, and were understood as such by the plaintiffs, who took action on that footing. It was not open to the defendant at a subsequent date and of his own choice to re-establish the status *quo ante*. The telegrams were a refusal on the part of the defendant to abide by and carry out his contracts, and the plaintiffs accepted and acted on such refusal as a breach of the contracts.

In view of this finding it is not necessary to go into the question of the alleged extension of time, as that is no longer material.

The defendant has in the 9th paragraph of his answer set up a claim in reconvention, which he estimates at Rs. 28,308.63. He declares that on the goods supplied by him between April 8, 1914, and May 26, 1916, the plaintiffs in their accounts have debited him with certain amounts not due from him. The plaintiffs have replied that such a claim is barred by prescription, and it is necessary to decide which section of the Prescription Ordinance, No. 22 of 1871, governs the case. The goods were supplied in terms of written contracts. The plaintiffs contend that section 9 applies. This provides "that no action shall be maintainable for or in respect of any goods sold and delivered, or for any shop bill or book debt, or for work and labour done, or for the wages of artisans, labourers, or servants, unless the same shall be brought within one year after the debt shall have become due."

For the defendant it is urged that the section which applies is the 7th, where it is laid down that "no action shall be maintainable—upon any written promise, contract, bargain, or agreement—unless such action shall be brought within six years from the date of the breach of such written promise, contract, bargain, or agreement."

The principle to be followed in dealing with this question has been laid down by the Full Court in the case reported on page 89 of the Fourth Volume of the Supreme Court Circular. There the plaintiff claimed rent on a notarially executed lease.

It was urged that the claim was governed by section 8, which refers to actions "for the recovery of rent," and not by section 7. The Supreme Court held as follows:—"We are clearly of opinion that it falls under the 7th section. It was argued that as the 8th section expressly

speaks of rent," the 7th section must apply to agreements other than agreements to pay rent under a lease. We think, however, that the converse is the case, and that the word "rent" in the 8th section means rent payable under obligations other than such as are mentioned in section 7.

Following this principle I hold that the claim in re-convention is governed by the 7th section of the Prescription Ordinance.

The cost of this trial will be the costs in the cause.

Samarawickreme (with him *R. L. Pereira*), for defendant, appellant.

A. St. V. Jayawardene (with him *Bartholomeusz* and *Canakaratne*), for plaintiffs, respondents.

Cur. adv. vult.

March 2, 1920. ENNIS J.—

In this case there is an appeal and a cross-appeal. The plaintiffs claimed Rs. 53,625 for the breach of certain contracts to ship copra and coconut oil. The defendant admitted his liability on one of these contracts entered into in January, 1916; but for the contract entered into in November, 1915, he denied his liability. The learned Judge found in favour of the plaintiffs, and the appeal is by the defendant.

It was argued for the appellant that the learned Judge was wrong in holding that the defendant had repudiated the contract. The alleged repudiation is found in the document P 1, in which the defendant gave definite notice to the plaintiffs that he would not ship the balance of copra and oil due under his contracts. It was urged that in sending this telegram the defendant merely meant to propose that the plaintiffs should enter into a further contract with him for the re-sale of the balance. It is merely a question of fact. The words of the document P 1 are not capable of that interpretation, and the letters upon which the appellant relies do not show that the plaintiffs had agreed to re-sell to the defendant any of the goods they purchased.

It was next urged that if P 1 were a repudiation of the contract, it was only operative if it had been accepted and acted upon. Some distinction was drawn between the two positions of "accepted" and "acted upon," but I am unable to follow the argument upon which it was based, or to hold that the cases cited are authorities in support of the contention. One of those cases was *Johnstone v. Milling*,[1] *Leake on Contract* (*p. 39*) was also referred to. Both of these authorities seem to indicate that all that is necessary is to notify the acceptance of the repudiation, and that would be sufficient acting upon the acceptance. The plaintiffs notified the defendant in P 16 as to the action they would take, offering to re-sell the balance of

[1] *16 L. J. Q. B. D. 460.*

goods due at certain prices. This offer was subject to a reply in twenty-four hours. The defendant refused the offer. The contract thereupon terminated.

In the circumstances the appeal fails, and I would dismiss it, with costs.

With regard to the cross-appeal, this is an appeal by the plaintiffs on a finding on the 17th issue that the defendant's claim in reconvention was not prescribed by section 7 of the Ordinance No. 22 of 1871. The contention for the plaintiffs is that the defendant's claim in reconvention is for the price of goods sold and delivered, and it is urged that section 9 of Ordinance No. 22 of 1871 applies. Section 9 reads:—

> " No action shall be maintainable for or in respect of any goods sold and delivered, or for any shop bill or book debt, or for work and labour done, or for the wages of artisans, labourers, or servants, unless the same shall be brought within one year after the debt shall have become due."

No case has been cited to us where the words " action for or in respect of any goods sold and delivered " has been brought under review.

The defendant's contract with the plaintiffs is a lengthy document, and has only to be glanced at to show that it is not an ordinary case of goods sold and delivered.

The contention for the plaintiffs was that sections 7 and 8 of the Ordinance No. 22 of 1871 exhaust the entire field of the contract. Section 7 provided the limitation for actions on written contracts, and section 8 of the limitary period for actions on unwritten contracts, and that being so there was no room for section 9, unless section 9 were regarded as a special enactment over-ruling the provisions of sections 7 and 8.

The defendant, on the other hand, contended that section 7, which related to written contracts, would apply, and that sections 8 and 9 must be read together as both relating to unwritten contracts. The rule of construction was enunciated in the case of *Pretty v. Solly* [1] referred to in *Craies Statute Law* (*4th ed., p. 201*):—

> " The general rules which are applicable to particular and general enactments in statutes (if they are repugnant) are very clear. The only difficulty is in their application. The rule is that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would over-rule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

[1] *(1859) 26 Beav. 606.*

So in this case the only difficulty is not in the rule to be applied, but in the application. It is not easy to see whether section 7 was meant as a particular enactment over-ruling both sections 8 and 9 or section 9, the particular enactment over-rules sections 7 and 8. The Full Court case of *Silva v. Lewis* [1] held that section 7 was such a particular enactment as compared to section 8; while the case of *Markar v. Hassen* [2] decided that, as between sections 8 and 9, section 9 was the particular enactment. This case was for goods sold and delivered. Whatever that expression may mean, section 9 unquestionably applied in the case, and it was so held.

With reference to the meaning of the term " goods sold and delivered, " I would refer to section 4 of the Sale of Goods Ordinance, No. 11 of 1896. (That Ordinance was enacted long after the Limitation Ordinance, but is referred to by way of illustration.) That section provides that a contract for the sale of goods shall not be enforceable by action unless the buyer has accepted part of the goods sold; or has paid the price or a part of it; or unles the contract has been reduced to writing and signed by the party to be charged. It would seem, them, that a contract for goods sold and delivered applies rather to an unwritten contract, which can be enforced by an action owing to the goods having been delivered, rather than to the contract made in writing and signed by the parties. In the circumstances I would hold that this is not a case of goods sold for which an action lies owing to the fact of delivery, but rather a case where the action is brought on the written contract, *i.e.*, it is not the action which is concisely known as one for the price of goods sold and delivered. I would accordingly regard section 7 of the Ordinance No. 22 of 1871 as a special enactment over-ruling section 9.

In the circumstances the decision of the learned District Judge on the issue decided by him would be right. I would accordingly dismiss the cross-appeal, with costs.

Loos.,A.J.—I agree

Appeal dismissed.

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[1] *4 S. C. C. 89.*

[2] *(1896) 2 N. L. R. 218.*