

1931

*Present : Garvin S.P.J. and
Maartensz A.J.*

ESUFBOY v. JEEVOJEE

285—*D. C. Colombo, 24,327.*

Sale of goods—Constructive delivery—Delivery by attornment.

In a contract for sale of goods, delivery of goods may be actual or constructive.

Delivery is constructive when it is effected without any change in the actual possession of the thing delivered as in the case of delivery by attornment or symbolic delivery.

THIS was an action for the recovery of a sum of Rs. 8,281·50 due on account of 250 bags of sugar delivered by Kadibhoy, plaintiff's intestate, to the defendant, or in the alternative to recover the sum of Rs. 8,281·25 on a cheque dated March 12, 1927, drawn by Adamjee and Company in favour of the defendant and endorsed by him to Kadibhoy, which was presented for payment and dishonoured on March 15, 1927.

It was admitted that the defendant by contract agreed to purchase from Kadibhoy 750 bags of sugar, which were to be shipped in the months of January,

¹ 32 *N. L. R.* 337.

February, and March, 1927. According to the contract payment was to be made before delivery and delivery was to be made at the buyer's stores. When the February shipment was ready for delivery the defendant requested Kadibhoy to deliver the sugar to Adamjee and Company. The defendant in his second answer set up the defence that Kadibhoy did not, in fact, make delivery of the sugar in terms of the contract. The learned District Judge gave judgment for the plaintiff.

Hayley, K.C. (with him *N. K. Choksy*), for defendant, appellant.—The defendant gave a distinct mandate to the plaintiff to deliver the sugar to Adamjee and Company.

If the cheque of Adamjee and Company was dishonoured before delivery of the sugar the necessary implication was that the plaintiff should have immediately informed the defendant-appellant.

The mandate of defendant to plaintiff ceased upon the dishonour of the cheque, more especially as the evidence was that in sugar contracts delivery is made only after actual payment. As the seller was the agent of the buyer (the defendant) to deliver the goods to a third party he is in law expected to take the same degree of care as he would in his own affairs. *Boustead on Agency, Articles 42-45.*

Further, the mandate was to deliver, not to enter into any arrangement and make a constructive delivery. Plaintiff having failed to observe the terms of his mandate strictly is not entitled to recover as against the defendant.

H. V. Perera (with him *Nadarajah*), for plaintiff, respondent, was not called upon. May 22, 1931. MAARTENSZ A.J.—

This was an action for the recovery of a sum of Rs. 8,281·60, the balance due on account of 250 bags of sugar alleged to have been sold and delivered by E. Kadibhoy, of whose estate the plaintiff is administrator, to the defendant, or in the alternative to recover a sum of Rs. 8,281·25 on a cheque dated March 12, 1927, drawn

by Adamjee and Company in favour of the defendant and endorsed and delivered by the defendant to E. Kadibhoy, which was presented for payment and dishonoured on March 15.

It is admitted that the defendant by his contracts dated December 22, 1926, and December 28, 1926, agreed to purchase from E. Kadibhoy 750 bags of sugar, which were to be shipped in the months of January, February, and March, 1927, at the rate of Rs. 35 a bag for the 375 bags purchased on the first contract and at the rate of Rs. 35·12½ a bag for the 375 bags on the second contract; that 250 bags of sugar of the February shipment were ready for delivery in March, that Rs. 8,515·62 was the value of the said bags, and that the defendant gave E. Kadibhoy the cheque sued on for Rs. 8,281·25 and another cheque drawn by himself for Rs. 234·37, which, with a sum of Rs. 250 paid in advance, made up the amount payable for the bags.

It is also admitted that the cheque for Rs. 8,281·25 was presented for payment on March 15 and dishonoured on the same date.

According to the contracts payment was to be made before delivery and delivery was to be made at the buyer's stores. The defendant, however, by his note P I dated March 12, 1927, requested Kadibhoy to deliver the 250 bags of sugar to Mulla Abdulhusein Adamjee and Company.

The defendant set up a number of defences to the plaintiff's claim in the two answers filed by him.

In his first answer the defendant pleaded, *inter alia*, that the contracts referred to in the plaint were mutually cancelled and defendant was released from the said contracts and a new contract was entered into between the plaintiff and M. Adamjee and Company, and that in pursuance of the new contract the plaintiff delivered the sugar in question to M. Adamjee and Company, and the cheque sued on was endorsed to the plaintiff without recourse to defendant.

The first answer was filed on February 13, 1928, after which defendant changed his proctor and filed a fresh answer on July 18, 1928. In the second answer the defence that there was a novation of the contract was abandoned. The main defence set up in the second answer was that Kadibhoy did not in fact make delivery of the 250 bags of sugar. This defence and the other defences set up in the second answer are embodied in the thirteen issues which were tried in the District Court.

The subsidiary defences may conveniently be disposed of first. They are formulated in issues Nos. 8, 9, 10, 11, 12, and 13.

The learned District Judge has accepted the evidence of Alibhoy that he took the cheque to defendant on the evening of the day it was dishonoured and asked for payment. He has also found that the cheque which was presented for payment on March 15 was presented on that day at defendant's request and that notice of dishonour was given to the defendant. I see no reason to dissent from these findings of fact and affirm the findings on these issues.

I shall now deal with the first issue which raises two questions—(a) whether plaintiff made delivery of the 250 bags of sugar, (b) whether the defendant accepted them.

I do not see how the second question, in the form in which the issue was framed, arises, as the plaintiff was directed by the defendant to deliver the bags to Adamjee and Company, and the real question is whether there was an acceptance by Adamjee and Company. This part of the issue, however, was not the subject of argument in appeal and it is not necessary to discuss it.

The way in which delivery is alleged to have been made to Adamjee and Company is as follows :—It appears that at the time in question Adamjee was under contract to deliver to Kadibhoy 625 bags of sugar and, instead of delivering 250 bags of

sugar and taking them back; by mutual agreement between Kadibhoy and Adamjee, 250 bags were appropriated against his (Adamjee's) contract to deliver 625 bags of sugar.

This arrangement was arrived at, according to Alibhoy, the plaintiff's witness, on March 13 after the cheque sued on and order to deliver had been handed to Alibhoy and before the cheque was dishonoured.

Adamjee had on or about March 8 delivered 105 bags of sugar. On March 3 and 4 he had sent bills D 2 and D 1 for the value of the sugar less Rs. 625 received in advance amounting to Rs. 18,421·87. At that date Adamjee owed Kadibhoy certain sums of money on two promissory notes. The amount due on the notes was deducted and a cheque for the balance Rs. 5,560·66 was sent to him on March 8. Adamjee therefore clearly had to deliver 500 bags of sugar and there was nothing unusual in the arrangement that the 250 bags referred to in the order P 1 should be set off against the 500 bags.

Adamjee who gave evidence for the defence is unworthy of credit. He was obviously trying to shape his evidence so as to help both sides. His evidence that he protested against the deduction is manifestly false. He stated that he went to Kadibhoy and protested against the deduction and told him that the cheque he had given—that is the cheque sued on—could not be met in consequence. This statement cannot be true for the deduction was made some days before the cheque sued on was drawn by Adamjee and Company.

The learned District Judge has not definitely found that the evidence of Alibhoy is to be preferred to the evidence of Adamjee; but in view of the result he must have done so. In considering the evidence on this point, it must be remembered that the defendant in his first answer specifically averred that the plaintiff had delivered the sugar to Adamjee

and Company. This averment must have been made with a full knowledge of the facts for it is incredible that the defendant would not have questioned Adamjee as to why his cheque for Rs. 28,81·25 had been dishonoured.

I accordingly hold that the 250 bags of sugar which Kadibhoy had to deliver to Adamjee and Company at the request of the defendant was by mutual agreement between Adamjee and Kadibhoy appropriated by Kadibhoy against the 500 bags Adamjee had to deliver to Kadibhoy.

Adamjee failed to deliver the balance 270 bags of sugar to Kadibhoy and Kadibhoy sold them to Adamjee and Company, and debited his account.

Adamjee in his ledger account with Kadibhoy (D 7) credited Kadibhoy with a sum of Rs. 8,281·25 as if he was liable to Kadibhoy for that sum. This entry appears after an entry dated March 18, and is clearly a false entry made to help the defendant.

The sum of Rs. 8,281·25 was admittedly debited to defendant in Kadibhoy's day book (page 58) on April 12. It was suggested that this entry was made to enable Kadibhoy to claim the sum against the defendant in view of Adamjee's financial difficulties. Alibhoy's explanation is that the entry was not made till April 12 because the defendant kept promising to pay him. This explanation is strongly supported by the fact that the entry was made after payment was demanded by the letter P 11 dated April 4, 1927. Again Adamjee's financial difficulties must have been well known, and it is idle to suppose that Kadibhoy would have looked to him as being liable on the contract instead of the defendant who was in a sound position financially.

It was contended, however, that the appropriation even if true was not in law a delivery which rendered the defendant liable to plaintiff. It was argued in support of this contention that Kadibhoy became the defendant's agent by accepting

the order P 1 and that he was not entitled to depart from the strict terms of the order and make delivery in any way other than that contemplated by the order, particularly as the defendant was prejudiced by the arrangement which took the place of physical delivery.

I am unable to assent to this argument. If Kadibhoy was an agent of the defendant he was an agent for the limited purpose of making delivery to Adamjee and Company, and if he made a delivery which was good in law he had discharged the duty cast upon him by the order P 1. Nor can I see that the defendant was in any way prejudiced. The defendant would have been in exactly the same position as he is now if Kadibhoy had sent the bags of sugar in some vehicle to Adamjee's stores and taken them back again as part delivery by Adamjee and Company against the 500 bags of sugar due to Kadibhoy from them.

I am also unable to assent to the contention that there was no delivery in law. Delivery means voluntary transfer of possession from one person to another. It may be actual or constructive delivery. Delivery is constructive when it is effected without any change in the actual possession of the thing delivered, as in the case of delivery by attornment or symbolic delivery. Delivery by attornment may take place in three classes of cases. First, the seller may be in possession of the goods, but after sale he may attorn to the buyer, and continue to hold the goods as his bailee. Secondly, the goods may be in the possession of the buyer before sale, but after sale he may hold them on his own account. Thirdly, the goods may be in the possession of a third person, as bailee for the seller. After sale such third person may attorn to the buyer and continue to hold them as his bailee (*Chalmers Sale of Goods Act*, 1893, 10th edition, p. 146).

Here Kadibhoy clearly attorned to the buyer Adamjee and Company for he took

the bags of sugar as part of delivery on account of his contract with Adamjee and Company.

I accordingly hold that Kadibhoy delivered the 250 bags of sugar, as directed by the defendant, to Adamjee who accepted them. As I have observed, part (b) of the 1st issue does not arise.

The 2nd issue must be answered in the affirmative. I do not understand the 3rd issue. It is extremely vague and there is no corollary issue as to the consequence of the issue being answered either in the affirmative or negative. The only part of 7 (a) of the answer in dispute is whether there was delivery and that is formulated in issue 1 (a).

The custom of the trade appears to me to have no bearing on the case, for there is no evidence that the defendant forbade delivery after he was informed that the cheque sued on was dishonoured. As regards the 4th issue I am unable to see how the proof of the custom referred to in issue 3 could amount to receipt of payment by the plaintiff.

I agree with the learned District Judge's findings on the issues 7 (a), (b), (c), and issue 8, for the reasons given by him. Besides the reason given by the District Judge there would not be the slightest ground for the claims formulated in these issues but for the interpolation in the account D 7 of a sum of Rs. 8,281.25 which I have already held to be a false entry.

I have dealt with the issues as they are set out on page 35 of the record which, we were informed by appellant's junior counsel—see his note pinned to the record—to be the issues on which the action was tried.

I dismiss the appeal with costs.

GARVIN J.—I agree.

Appeal dismissed.