M/S. MURLIDHAR CHIRANJILAL

v.

M/S. HARISHCHANDRA DWARKADAS AND ANOTHER

1961

March 29.

(P. B. GAJENDRAGADKAR and K.N. WANCHOO, JJ.)

Damages—Breach of contract—Sale of goods—Measure of damages—Foreseeable consequence of breach—Knowledge of parties —Indian Contract Act, 1872 (9 of 1872), s. 73.

The appellant entered into a contract with the respondent for the sale of certain canvas at Re. 1 per yard under which the delivery was to be made through railway receipt for Calcutta f. o. r. Kanpur. The cost of transport from Kanpur to Calcutta and the labour charges in that connection were to be borne by the respondent and it was agreed that the railway receipt would be delivered on August 5, 1947. The appellant was unable to deliver the railway receipt on the due date because booking from Kanpur to Calcutta was closed, and, therefore, cancelled the contract. The respondent instituted a suit for the recovery of damages for the breach of the contract and claimed that as the seller knew that the goods were to be sent to Calcutta and must therefore be presumed to know that the goods would be sold in Calcutta, any loss of profit to the buyer resulting from the difference between the rate in Calcutta on the date of the the breach and the contract rate would be the measure of damages.

Held: (1) that it is well settled that the two principles relating to compensation for loss or damage caused by breach of contract as laid down in s. 73 of the Indian Contract Act, 1872, read with the Explanation thereof, are (i) that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed, but (ii) that there is a duty on him of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps.

British Westinghouse Electric and Manufacturing Company, Limited v. *Underground Electric Railway Company of London*, [1912] A.C. 673, relied on.

(2) that the contract in the present case was for delivery f. o. r. Kanpur in which it was open to the buyer to sell the goods where it liked, and no inference could be drawn from the mere fact that goods were to be booked for Calcutta that the seller knew that the goods were for re-sale in Calcutta only. The contract was therefore not of the special type to which the words "which the parties knew, when they made the contract,

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to be likely to result from the breach of it" appearing in s. 73 of the Indian Contract Act, 1872, would apply, but an ordinary contract, for which the measure of damages would be such as "naturally arose in the usual course of things from such breach" within the meaning of that section. The damages would be the difference between the market price in Kanpur on the date of breach and the contract price. But as the respondent had failed to prove the rate for similar canvas in Kanpur on the date of breach, it was not entitled to any damages as there was no measure for arriving at the quantum.

Chao and others v. *British Traders and Shippers Ltd.*, [1954] 1 All E.R. 779, relied on.

Re. R and H. Hall Ltd. and W.P. Pim (Junior) & Co.'s Arbitration, [1928] All E.R. 769 *and Victoria Laundry (Winsdsor) Ltd.* v. *Newman Industries Ltd.*, [1949] 1 All E.R. 997, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 193 of 1958.

Appeal by special leave from the judgment and decree dated October 3, 1955, of the High Court of Judicature, Madhya Bharat, Indore, in Civil First Appeal No. 58 of 1952.

C. B. Aggarwala and *Bhagwan Das Jain*, for the appellant.

Radhey Lal Aggarwal and *A. G. Ratnaparkhi*, for respondent No. 1.

1961. March 29. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO, J.—This is an appeal by special leave from the judgment of the High Court of Madhya Bharat. A suit was filed by firm Messrs. Harishchandra Dwarkadas (hereinafter called the respondent) against the appellant-firm Messrs. Murlidhar Chiranjilal and one Babulal. The case of the respondent was that a contract had been entered into between the appellant and the respondent through Babulal for sale of certain canvas at Re. 1 per yard. The delivery was to be made through railway receipt for Calcutta f. o. r. Kanpur. The cost of transport from Kanpur to Calcutta and the labour charges in that connection were to be borne by the respondent. It was also agreed that the railway receipt would be delivered on August 5, 1947. The appellant however failed to

deliver the railway receipt and informed the respondent on August 8, 1947, that as booking from Kanpur to Calcutta was closed the contract had become impossible of performance; consequently the appellant cancelled the contract and returned the advance that had been received. The respondent did not accept that the contract had become impossible of performance and informed the appellant that it had committed a breach of the contract and was thus liable in damages. After further exchange of notices between the parties, the present suit was filed in November, 1947.

Written statements were filed both by the appellant and Babulal. The contention of Babulal was that the contract had become incapable of performance and was therefore rightly rescinded. Further Babulal contended that he was not in any case liable to pay any damages. The appellant on the other hand denied all knowledge of the contract and did not admit that it was liable to pay any damages. Certain other pleas were raised by the appellant with which we are however not concerned in the present appeal.

Three main questions arose for determination on the pleadings of the parties. The first was whether Babulal had acted as agent of the appellant in the matter of this contract; the second was whether the contract had become impossible of performance because the booking of goods from Kanpur to Calcutta was stopped; and the last was whether the respondent was entitled to damages at the rate claimed by it.

The trial court held that Babulal had acted as the agent of the appellant in the matter of the contract and the appellant was therefore bound by it. It further held that the contract had become impossible of performance. Lastly it held that it was the respondent's duty when the appellant had failed to perform the contract to buy the goods in Kanpur and the respondent had failed to prove the rate prevalent in Kanpur on the date of the breach (namely, August 5, 1947) and therefore was not entitled to any damages. On this view the suit was dismissed.

The respondent went in appeal to the High Court

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and the two main questions that arose there were about the impossibility of the performance of the contract and the liability of the appellant for damages. The High Court held that the contract had not become impossible of performance as it had not been proved that the booking between Kanpur and Calcutta was closed at the relevant time. It further held that the respondent was entitled to damages on the basis of the rate prevalent in Calcutta on the date of breach and after making certain deductions decreed the suit for Rs. 16,946. Thereupon there was an application by the appellant for a certificate to appeal to this Court, which was rejected. This was followed by an application to this Court for special leave which was granted; and that is how the matter has come up before us.

The same two questions which were in dispute before the High Court have been raised before us on behalf of the appellant. We think it unnecessary to decide whether the contract had become impossible of performance, as we have come to the conclusion that the appeal must succeed on the other point raised on behalf of the appellant. The necessary facts in that connection are these: The contract was to be performed by delivery of railway receipt f. o. r. Kanpur by the appellant to the respondent on August 5, 1947. This was not done and therefore there was undoubtedly a breach of the contract on that date. The question therefore that arises is whether the respondent has proved the damages which it claims to be entitled to for the breach. The respondent's evidence on this point was that it proved the rate of coloured canvas in Calcutta on or about the date of the breach. This rate was Rs. 1-8-3 per yard and the respondent claimed that it was therefore entitled to damages at the rate of Re. 0-8-3 per yard, as the contract rate settled between the parties was Re. 1 per yard.

The quantum of damages in a case of this kind has to be determined under s. 73 of the Contract Act, No. IX of 1872. The relevant part of it is as follows:—

"When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.....

"*Explanation*—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

The contention on behalf of the appellant is that the contract was for delivery f. o. r. Kanpur and the respondent had therefore to prove the rate of plain (not coloured) canvas at Kanpur on or about the date of breach to be entitled to any damages at all. The respondent admittedly has not proved the rate of such canvas prevalent in Kanpur on or about the date of breach and therefore it was not entitled to any damages at all, for there is no measure for arriving at the quantum of damages on the record in this case. Where goods are available in the market, it is the difference between the market price on the date of the breach and the contract price which is the measure of damages. The appellant therefore contends that as it is not the case of the respondent that similar canvas was not available in the market at Kanpur on or about the date of breach, it was the duty of the respondent to buy the canvas in Kanpur and rail it for Calcutta and if it suffered any damage because of the rise in price over the contract price on that account it would be entitled to such damages. But it has failed to prove the rate of similar canvas in Kanpur on the relevant date. There is thus no way in which it can be found that the respondent suffered any damage by the breach of this contract.

The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain

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to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps: (*British Westinghouse Electric and Manufacturing Company Limited* v. *Underground Electric Railways Company of London* (1)). These two principles also follow from the law as laid down in s. 73 read with the *Explanation* thereof. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be re-imbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.

But the learned counsel for the respondent relies on that part of s. 73 which says that damages may be measured by what the parties knew when they made the contract to be likely to result from the breach of it. It is contended that the contract clearly showed that the goods were to be transported to and sold in Calcutta and therefore it was the price in Calcutta which would have to be taken into account in arriving at the measure of damages for the parties knew when they made the contract that the goods were to be sold in Calcutta. Reliance in this connection is placed on

(1) [1912] A.C. 673, 689.

two cases, the first of which is *Re. R. and H. Hall Ltd. and W. H. Pim (Junior) & Co.'s Arbitration* (1). In that case it was held that damages recoverable by the buyers should not be limited merely to the difference between the contract price and the market price on the date of breach but should include both the buyers' own loss of profit on the re-sale and the damages for which they would be liable for their breach of the contract of re-sale, because such damages must reasonably be supposed to have been in the contemplation of the parties at the time the contract was made since the contract itself expressly provided for re-sale before delivery, and because the parties knew that it was not unlikely that such re-sale would occur. That was a case where the seller sold unspecified cargo of Australian wheat at a fixed price. The contract provided that notice of appropriation to the contract of a specific cargo in a specific ship should be given within a specified time and also contained express provisions as to what should be done in various circumstances if the cargo should be re-sold one or more times before delivery. That was thus a case of a special type in which both buyers and seller knew at the time the contract was made that there was an even chance that the buyers could re-sell the cargo before delivery and not retain it themselves.

The second case on which reliance was placed is *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* (2). That was a case of a boiler being sold to a laundry and it was held that damages for loss of profit were recoverable if it was apparent to the defendant as reasonable persons that the delay in delivery was liable to lead to such loss to the plaintiffs. These two cases exemplify that provision of s. 73 of the Contract Act, which provides that the measure of damages in certain circumstances may be what the parties knew when they made the contract to be likely to result from the breach of it. But they are cases of a special type; in one case the parties knew that goods purchased were likely to be re-sold before delivery and therefore any loss by the breach of contract eventually

(1) [1928] All E.R. 763. (2) [1949] 1 All E.R. 997.

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may include loss that may have been suffered by the buyers because of the failure to honour the intermediate contract of re-sale made by them; in the other the goods were purchased by the party for his own business for a particular purpose which the sellers were expected to know and if any loss resulted from the delay in the supply the sellers would be liable for that loss also, if they had knowledge that such loss was likely to result.

The question is whether the present is a case like these two cases at all. It is urged on behalf of the respondent that the seller knew that the goods were to be sent to Calcutta; therefore it should be presumed to know that the goods would be sold in Calcutta and any loss of profit to the buyer resulting from the difference between the rate in Calcutta on the date of the breach and the contract rate would be the measure of damages. Now there is no dispute that the buyer had purchased canvas in this case for re-sale; but we cannot infer from the mere fact that the goods were to be booked for Calcutta that the seller knew that the goods were for re-sale in Calcutta only. As a matter of fact it cannot be denied that it was open to the buyer in this case to sell the railway receipt as soon at it was received in Kanpnr and there can be no inference from the mere fact that the goods were to be sent to Calcutta that they were meant only for sale in Calcutta. It was open to the buyer to sell them anywhere it liked. Therefore this is not a case where it can be said that the parties knew when they made the contract that the goods were meant for sale in Calcutta alone and thus the difference between the price in Calcutta at the date of the breach and the contract price would be the measure of damages as the likely result from the breach. The contract was for delivery f.o.r. Kanpur and was an ordinary contract in which it was open to the buyer to sell the goods where it liked.

We may in this connection refer to the following observations in *Chao and others* v. *British Traders and Shippers Ltd.* (1), which are apposite to the facts of the present case:

(1) [1954] 1 All E.R. 779, 797.

"It is true that the defendants knew that the plaintiffs were merchants and, therefore, had bought for re-sale, but every one who sells to a merchant knows that he has bought for re-sale, and it does not, as I understand it, make any difference to the ordinary measure of damages where there is a market. What is contemplated is that the merchant buys for re-sale, but, if the goods are not delivered to him, he will go out into the market and buy similar goods and honour his contract in that way. If the market has fallen he has not suffered any damage, if the market has risen the measure of damages is the difference in the market price."

In these circumstances this is not a case where it can be said that the parties when they made the contract knew that the likely result of breach would be that the buyer would not be able to make profit in Calcutta. This is a simple case of purchase of goods for re-sale anywhere and therefore the measure of damages has to be calculated as they would naturally arise in the usual course of things from such breach. That means that the respondent had to prove the market rate at Kanpur on the date of breach for similar goods and that would fix the amount of damages, in case that rate had gone above the contract rate on the date of breach. We are therefore of opinion that this is not a case of the special type to which the words "which the parties knew, when they made the contract, to be likely to result from the breach of it" appearing in s. 73 of the Contract Act apply. This is an ordinary case of contract between traders which is covered by the words "which naturally arose in the usual course of things from such breach" appearing in s. 73. As the respondent had failed to prove the rate for similar canvas in Kanpur on the date of breach it is not entitled to any damages in the circumstances. The appeal is therefore allowed, the decree of the High Court set aside and of the trial court restored with costs to the appellant throughout.

Appeal allowed.