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BOUSTEAD *et al.* *v.* VANDERSPAR & CO.

[Kokarakande Estate Case.]

D. C. Colombo, 21,506.

Written contract—Oral evidence—Inadmissibility—Latent ambiguity—Evidence Act, ss. 92 and 95.

Messrs. B & B entered into a written contract with Messrs. V & Co. to sell to the latter "the whole crop (January to December, 1904, inclusive) of Kokarakande estate made into green tea at 39 cents per pound." There was no estate by the name of Kokarakande. It was only a block of 50 acres forming part of Deviturai estate. In an action by Messrs. B & B against Messrs. V & Co. for damages for refusing to take delivery of certain quantities of tea tendered under the contract, the plaintiffs sought to prove by oral evidence that the words "the whole crop of Kokarakande estate made into green tea" were intended to mean the whole crop of the leaf from the fields on Deviturai estate which had been picked within six months of pruning, and that the words "Kokarakande estate" were merely used "as a mark or trade name."

Held, that such evidence was inadmissible, its effect being to vary the terms of the written contract.

APPEAL by the defendants from judgment of the Additional District Judge of Colombo (Mr. F. R. Dias).

The defendant company entered into a contract with the plaintiffs for the purchase of certain tea by letter No. 23/1,292, dated 14th December, 1903, which was as follows:—

Forbes & Walker.
Contract No. 23/1,292.
L. T. Boustead, Esq., Colombo, 14th December, 1903.
Nuwara Eliya.

DEAR SIR,—WE beg to confirm sale made by us this day on your account to Messrs. J. J. Vanderspar & Co. of the whole crop (January to December, 1904, inclusive) of Kokarakande estate made into green tea at 39 cents per pound; packed in half chests, the buyers being credited with any bonus paid by the Thirty Committee; to be delivered as manufactured.

The quality to be nearly as possible the same as the samples handed buyers.

The proportion to be approximately: young Hyson 40 per cent. Hyson 40 per cent., Hyson No. 21½ per cent., gunpowder 9½ per cent., siftings 9 per cent.

The sellers bind themselves not to sell any tea under Kokarakande mark outside this contract whilst the above-mentioned teas are under delivery.

Any dispute that may arise in connection with this contract to be settled by arbitration.

Yours faithfully,
Per pro FORBES & WALKER,
A. H. BARBER,
Brokers.

The crop for the year is estimated at 100,000 lb. to 120,000 lb.

The terms of this contract were subsequently altered by letter dated 30th May, 1904, which was as follows:—

Colombo, 30th May, 1904.

Messrs. J. J. Vanderspar & Co.,
Colombo.

Re *Kokarakande Crop*, 1904.

DEAR SIRS,—WE are authorized by our principals to agree to your request that the balance of the crop from above estate be converted into black tea at 37 cents per lb., with your option of reverting to greens at the original price of the contract, viz., 39 cents, one month's notice being given the seller of such intention.

All teas now manufactured or being manufactured to be taken over unreservedly at the contract price, with the exception of invoice No. 9, which is now under dispute.

In the event of green teas being returned to, the contract price is to revert to 39 cents, regardless of the present standards which are now null and void, and all future green teas manufacture will be carried out as far as possible according to your own wishes, provided no additional cost is entailed to the estate.

Please confirm this arrangement to permit us to give the necessary instructions to the estate.

Yours faithfully,
FORBES & WALKER.

The plaintiffs, alleging that the defendant company had in October, 1904, refused to take delivery of certain quantities of tea tendered in terms of the said contract, brought this action to recover a sum of Rs. 3,182.65 as damages for breach of contract. The defendants pleaded that the tea tendered was not made out of the whole crop of Kokarakande estate as contracted, and that it was not up to sample, and that they were justified in refusing to accept delivery.

The District Judge gave judgment for the plaintiffs. After dealing with the facts, he observed:—

"From the circumstances above recited it will appear that the simple point we have to determine is whether or not the teas tendered to the defendants were 'Kokarakande crop' as contemplated by the contract.

"Before we proceed further we may regard it as proved beyond all doubt that there is not, and never was, an estate of the name of 'Kokarakande'.

"Even the defendants' witness, Mr. Hawke, who is now in the defendants' service, and who for about nine years prior to May, 1904, was an assistant superintendent on Deviturai estate, admits that there was no such estate, but that 'Kokarakande estate' was the fancy name under which the green tea made from the young leaf of all the Deviturai fields was sold. The position taken up by the

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defendants, at least in their answer, is that there was a 'Kokarakande estate,' and that, as the teas tendered did not come from there, they were justified in refusing to accept them, and in counter-claiming damages as for a breach of contract by the plaintiffs.

"I think there is no room for doubt that any person, unacquainted with the tea trade or with the special significance of the plaintiffs' fancy name for their green tea, can only understand this contract P 10 in one way, namely, that it was intended to refer to the whole green tea crop of an estate called 'Kokarakande estate'. There was therefore every excuse for Mr. Vanderspar, who was not in Ceylon when any of the contracts were made with the plaintiffs, in interpreting the contract according to the plain English of it, and I am quite prepared to accept his statement that, until his correspondence with Messers. Forbes & Walker in September, he had not the slightest idea as to the true origin or methods of manufacture of the tea crop his firm had bought. Hence, his rejection of the tenders after that discovery could not fairly be characterized as being so arbitrary or reprehensible as it has been made out to be.

"If indeed the defence had been that, when the contract was made, the plaintiffs had one sort of tea in their mind while the defendants had another, and that therefore the contract was bad for want of a *consensus ad idem*, there would have been something in it. But, as I have stated above, that is not the defence. The defendants accept the validity of the contract, and we are consequently driven to find out what the contracting parties intended by the expression 'the whole crop of Kokarakande estate made into green tea.' The defendants' counsel objected to any evidence being admitted to explain the obvious meaning of these words, but I overruled his objection. Under section 95 of our Evidence Ordinance, when language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a particular sense. In the present case the words are perfectly plain, as I have said before, but they are meaningless when applied to existing facts, namely, the non-existence of a Kokarakande estate. The description of the specific thing sold being inaccurate, the maxim *falsa demonstratio non nocet* applies, and evidence becomes admissible to show what the real thing intended was. It was therefore perfectly legitimate to admit oral testimony as to the true significance of the words in question, and consequently evidence of what transpired with the defendants' representatives, Mr. Walthew, at and before the signing of the contract."

The defendants appealed.

Dornhorst, K.C. (*F. J. de Saram* with him), for the defendants appellants. 1906. *February* 6.

H. J. C. Pereira, for the plaintiffs—respondents.

Cur. adv. vult.

6th February, 1906. Wood Renton, J.—

In this case various issues were raised, decided in the Court below, and argued on appeal. But in the view I take of the law applicable to it, two points only need be considered:—

(1) Is the contract, whose interpretation is in dispute, a written contract, embodied in Messrs. Forbes & Walker's letter to Mr. Boustead, one of the respondents, dated 14th December, 1903 (P 10), as modified by Messrs. Forbes & Walker's subsequent letter to Messrs. Vanderspar & Co., dated 22nd September, 1904 (P 11), or a parole contract, of which these letters are merely evidence ?

(2) In the former alternative, can the respondents interpret the terms of the written contract by parole evidence in the way in which they have successfully claimed the right to do in the Court below ?

(1) At a somewhat late stage in the argument before us, Mr. H. J. C. Pereira, counsel for the respondents, contended rather faintly that the real contract between the parties was a parole contract, evidenced by, but not embodied in, the two letters above referred to. In my opinion this argument is untenable on several grounds. Not only was it never broached in the Court below, but the respondents in their plaint treated the letters in question as constitutive of the contract, and devoted their whole efforts to persuading the District Judge that the case was one in which, notwithstanding the fact that the parties had reduced their agreement into writing, parole evidence was admissible. Moreover, although the original contract of 14th December, 1903, is in effect the brokers' sold note, it was produced and relied upon by the sellers themselves, who received it from their agents, the brokers. They made no attempt to show that it varied from the bought note, or the signed entry in the brokers' book, or that it was not in fact in accordance with the contract. On the contrary, their main contention both here and below has been that they do not challenge its accuracy, but desire only, on the ground of latent ambiguity, to explain certain of its terms. These considerations, it seems to me, dispose of Mr. Pereira's first point, whether we have regard to the law as to bought and sold notes (see *Parton v. Crofts*, (1864), 33 *L. J. C. P.* 189; *Thompson v. Gardiner* (1876), 1, *C. P. D.* 777; *Sievewright v. Archibald* (1851), 17 *Q.B.* 101), or consider the case as an ordinary one of contract by correspondence.

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Although the first letter was not addressed to the appellants, we might fairly assume, from the conduct of both parties, that there was a bought note in identical terms. In any event, the second letter adopts, in my opinion, all the provisions of the first which it does not modify, and the two letters constitute one contract which we must deal with as a whole.

(2) I proceed in the next place to inquire whether the parole evidence which it is sought to adduce in aid of the interpretation of the written contract in this case is legally admissible. The facts are clearly stated by the District Judge in his careful and able judgment, and I do not propose to recapitulate them here. It is admitted by the respondents that, according to the plain meaning of words in the English language, the subject-matter of the sale, as defined by the letter of 14th December, 1903, was " the whole crop (January to December, 1904, inclusive) of Kokarakande estate made into green tea at 39 cents per pound." The yield of the crop was estimated at from 100,000 to 120,000 lbs. The letter of 30th May, 1904, provided for the conversion of " the balance of the crop from above estate " into black tea at 37 cents per pound, the purchasers having an option " of reverting to green at the original price of the contract." It is conceded on all hands that if we take the words which the parties used to express their meaning in their natural sense, what the purchasers had a right to expect under their contract was the whole crop of a particular " estate " called Kokarakande. It appears, however, that there is in fact no " estate " called Kokarakande. Kokarakande is noly a block of some 50 acres forming part of Deviturai estate, and incapable, as it was suggested, of yielding the crop contemplated by the contract. Here then, say the respondents, we have language used in a document which although plain in itself " is unmeaning in reference to existing facts." Section 95 of the Evidence Ordinance therefore applies, and " evidence may be given to show that it was used in a particular sense." The " particular sense " which the respondents desire to attach to this latent ambiguity was embodied by Mr. Pereira at the request of my lord the Chief Justice in the following clause. Instead of " the whole crop of Kokarakande estate made into green tea " we are to read, treating " Kokarakande " estate "as a mark or trade name," " the whole crop of the leaf from the fields on Deviturai estate which had been picked within six months of pruning." It may be noted in passing that the evidence shows that while the best green tea is made out of such pickings, green tea can be made out of the older leaf. It is tolerably clear that the clause which I have cited goes far beyond a mere explanation of a latent ambiguity, and accordingly Mr. Pereira sought to fortify his position

first by contending that under section 95, if an explanation of a latent ambiguity is admissible at all, the whole transaction may be ripped up and the real intention of the parties shown, and then by falling back on provisos 5 and 6 of section 93 of the Evidence Ordinance. Of these provisos the former admits evidence of usage not repugnant to or inconsistent with the express term of a contract, while according to the latter " any fact may be proved which shows in what manner the language of a document is related to existing facts." It appears to me that, on each of the grounds above indicated, the respondents' case fails. I am not satisfied that the words of the original contract are "unmeaning in reference to existing facts " under section 95 of the Evidence Ordinance. If there is not an " estate " called " Kokarakande," there is at least a property of that name, on which a crop capable of being converted into green tea was grown. There is a distinction between an inaccurate description and an ambiguous one, and there is English authority for the view that when a description as a whole fits no object, but part of it accurately fits an object, the rest of the description may be rejected (*Shepherd's Touchstone, p.* 247). The fact—if it be a fact—that the Kokarakande block could not yield the estimated crop does not improve the respondents' position. It may be a provision which the respondents could not fulfil, and for which they ought to be liable in damages or otherwise to the appellants. It does not make the contract " unmeaning." Even if section 95 applied, I do not think that under that section evidence can be given to show that the words " whole crop " meant only the tippings of not more than six months' standing. To admit such evidence would be not to explain the language of the instrument, but to set it aside, under the guise of effectuating the intention of the parties, and to allow an inconsistent parole contract to be set up in its place.

In such cases as the present—to quote the language of Lord Justice Rigby in *In re Grainger* (1900) 2Ch. at p. 763—" the fundamental distinction between evidence simply explanatory of the words themselves, and evidence sought to be applied to prove intention itself as an independent fact, must never be lost sight of." Mr. Pereira cited to us no authority which really supports his argument on the point under consideration. The Quendon Hall Estate case, *Webb v. Byng* (1855), 1 K. and J. 580, in any event would not justify the admission of any evidence contradicting the ordinary English meaning of the words, " the whole crop." The case of *Goodtitle d. Radford v. Southern* (1815), 1 *M. and S.* 299, to which his attention was called by the Court, is really against him. There, in the construction of a devise of " all that portion of my farm called Troguesfarm now in

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the occupation of A. C," evidence was admitted to show that the devise included other lands of Troguesfarm not in the occupation of A. C., but the *ratio decidendi* was that if any lands forming part of Troguesfarm were excluded, the word " all " would not be satisfied. Here the respondents propose not to satisfy or exhaust the words " whole crop," but to limit and contradict them. On the question of usage I need say little. No independent evidence was forthcoming to show that the words " Kokarakande estate " had acquired as a trade name the full meaning embodied in the clause I have quoted above—nothing less than the proof of this fact would be of any avail—as, according to the respondents themselves, this so-called " trade name " was not at first limited to six months' tippings. Moreover—and this observation applies equally to the attempt to prove intention apart from usage and to the argument based on proviso 6 of section 92—the clause, which it is sought to import into the contract, is directly repugnant to and inconsistent with its terms as a whole. With that part of the original contract of 14th December, 1903, which speaks " of the whole crop of Kokarakande estate " I have dealt already. It is equally inconsistent with the following passages in the letter of 30th May, 1904, " the crop from *above estate*," " provided no additional cost is entailed to the estate," " the necessary instructions to the estate." It is at still more striking variance with the terms of some of the correspondence which was read to us, but on which I need not dwell. Mr. Pereira admitted the looseness of the language employed in these extracts, but said that it was natural enough in view of the pressure under which such letters were written. I can only reply that if business men choose to define the subject-matter of their contracts in this slipshod fashion, whether the fact be due to their misfortune or their fault, they must take the risk of its consequences. The general rule of law, which does not, save in exceptional cases, under none of which can the present case be brought, permit written contracts to be varied by parole evidence, is clear, salutary, and must be maintained. As the respondents have not carried out their contract in its plain and ordinary signification their action should have been dismissed. The appeal must be allowed with costs.

LAYARD, C.J. Agreed.