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Present : Bertram C.J. and Schneider J.

THE HOLLAND CEYLON COMMERCIAL CO. *v.* MAHUTHOOM PILLAI.

38—D. C. Colombo, 991.

Goods ordered from abroad by a firm of importers for commission—Failure of person ordering to accept delivery—Action for damage—Must action be instituted by foreign shipper?—Repudiation of contract—Is the other party bound to take steps to minimize damages?

The defendant requested the plaintiffs company (a firm of merchants carrying on an import business) to order through their correspondents certain goods from abroad, and agreed to pay the invoice price, plus a commission of 3 per cent. The defendant refused to accept delivery of a portion of the goods.

Held, that as the contract was between the plaintiffs company and defendant, plaintiffs company was entitled to sue for damages.

Where one party to an agreement repudiates it, the other is not bound to accept the repudiation. He may stand upon his contract, and hold the other party responsible and wait for the time of performance. If he does this, he is under no obligation to make any attempt to minimize damages. It is only where he elects to treat the repudiation as an immediate breach and to sue upon the contract at once, that it becomes his duty to do his best to minimize damages.

THE facts are set out in the judgment of the Acting District Judge (K. Balasingham, Esq.):—

Plaintiff is a limited liability company registered at Amsterdam, with a place of business in Colombo as well. On December 17, 1919, defendant requested the plaintiff to import for him fifty cases of Belgian playing cards at 34*s*. 7*d*. per gross. Subsequently, on January 5, 1920, the price was fixed at 41*s*. 6*d*. The defendant took delivery of twenty cases in October, 1920, and paid for the same. He would not take delivery of twenty cases in December, 1920. Plaintiff sold the lot at defendant's risk, and claims the difference in price as damages from defendant. In the first place, defendant says that plaintiff was only an agent and, therefore, cannot sue. He relies on *20 N. L. R. 268* in support of this contention. That case does not apply to the facts of this case. The plaintiff, if he was an agent at all, was an agent for an

undisclosed foreign principal, and, as such, can sue and be sued on the contract. In any case there was no privity of contract between the defendant and any manufacturer. Plaintiff was to import the goods on his own responsibility, and there is nothing to show that he was not the only person liable to the manufacturers for non-payment of price. The fact that it was agreed that plaintiff was to get a commission for importing does not make any difference. I answer issues 2, 2A, 3, and 7 in the affirmative. Defendant's next point is that it was agreed at the time when the contract was entered into, that the goods were to be paid for at the rate of exchange prevailing at the date of the indent—in December, 1919. Neither the indent, nor the order, nor any other document embody this agreement. The plaintiff raises the objection of law that oral evidence is not admissible to prove this alleged agreement. In my opinion, oral evidence is admissible to prove this. It is not proposed to add to or vary the contract, but merely to explain the meaning to be attached to £. s. d. at a time when exchange was unstable. The defendant says that Mr. Ponnambalam was the canvasser of the plaintiff, and that he made him understand that if he would place a large order of fifty cases the exchange would be booked by the firm, and defendant was to pay nothing for booking the exchange. Plaintiff's counsel objected that this is not what defendant relied on in his answer (paragraph 9) and in the issue (4). It is true that in the answer and in the issue it is not alleged that plaintiff undertook to book the exchange, but it is clear that the booking of the exchange was only a means by which plaintiff was to insure himself against loss resulting from the fluctuation of exchange. There is, therefore, no change of front on the part of the defendant when he spoke in the witness box of booking exchange. Mr. Ponnambalam denies that he made defendant understand that the exchange would be booked by the firm, or that defendant was to be charged at the rate of exchange prevailing in December, 1919. I cannot accept Mr. Ponnambalam's evidence on this point. The letters D 1 to D 5 support defendant's case very considerably as to this agreement, and I hold that plaintiff's canvasser did tell defendant that exchange would be booked, or, what amounts to the same thing, that defendant would be charged the rate of exchange prevailing in December, 1919.

Defendant says that he did not refer to this agreement in the indent or order at Mr. Ponnambalam's request. That is probably true. Mr. Ponnambalam was only a canvasser who had no authority to enter into an agreement with anyone as to booking exchange or as to charging the price at a particular rate of exchange. Mr. Ponnambalam clearly exceeded his authority in making defendant understand that he would be charged the December exchange rate. I doubt whether Mr. Ponnambalam was an agent at all. He was merely a paid servant of the plaintiff to bring customers to the firm, and all the terms of the contract had to be entered into with the plaintiff. Defendant himself ought to have known this, and if he thought otherwise he ought to pay the penalty. I answer issue 4 in the negative.

Whatever defendant's attitude was at first, it is clear that in September, 1920, when the first consignment of twenty cases arrived, he waived all objections, and took delivery of the goods and paid for the same. He only stipulated that no interest or other charges in respect of the twenty cases should be charged, and that plaintiff was to do his best to cancel the order for the remaining thirty cases. Plaintiff's evidence on this point is supported by his letters P 4—P 7. Plaintiff in terms of this new agreement endeavoured to get the order for the thirty cases cancelled, but succeeded only in getting ten cases cancelled. In view of the new

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agreement arrived in September or October, 1920, it is not now open to the defendant to maintain his original position. I answer the 5th issue in plaintiff's favour. There is clear evidence as to damages I enter judgment for plaintiff as prayed for, with costs.

The defendant's indent and letter were as follows:—

A.

Colombo, December 17, 1919.

M. M. Mahuthoom Pillai, General Merchant, Nos. 12, 13, and 14, Dam street, Pettah.

Messrs. Holland Ceylon Commercial Co., Colombo.

DEAR SIRS,—PLEASE order through your agents for fifty cases playing cards No. 2, Belgian make, "Eagle Brand," at 34/7 per gross c.i.f., Colombo.

Colours: red, blue, and green. Packing as usual, 10 gross per case. Shipment in three equal lots at the interval of 60/75 days.

Please wire for immediate shipment and oblige.

Yours faithfully,
(*Signed*) B. S. SEGO MOHAMADO SAIBO,
for M. M. M. PILLAI,

B.

No. S. 156. Colombo, December 17, 1919.

We, the *undersigned*, M. M. Mahuthoom Pillai, hereby request Messrs. Holland Ceylon Commercial Co. to order and import on our account through their correspondents the under-mentioned goods, at the prices and on the terms specified below—the whole or any part of which goods I/We agree to receive on arrival—payment for the same to be made on the day on which the goods are tendered for delivery, or within ten days afterwards, as follows:—

Cash or promissory note by agreement.

The goods to be received from Messrs. Holland Ceylon Commercial Co. either at their godowns or at the Customs-house as tendered, and delivery to be taken on the day on which the goods are tendered or within ten days afterwards—the removal being at the expense and risk of the purchaser.

If the arbitrators or umpire should find that the goods are not of the quality ordered, or are not in good condition, they shall decide what allowance or deduction in price (if any) should be made by the said Messrs. Holland Ceylon Commercial Co., for and on account thereof for on no account can the indebtor refuse to take and accept the said goods.

The arbitrator shall also decide who should pay the costs of the reference.

50 (fifty) cases playing cards No. 2 celebrated.

"Eagle Brand" at 34*s.* 7*d.* per gross c.i.f., Colombo.

Colours: red, blue, and green.

Packing.—One dozen in a small packet, such 3 dozens in a large packet, ½ gross and 10 gross per case as usually supplied to Colombo market. Send shipment samples in duplicate. Shipment as soon as possible. Commission 3 per cent.

E. W. Jayawardene (with him *H. V. Perera* and *Ranawaka*), for appellant.

Bartholomeusz (with him *Canakaratne* and *R. C. Fonseka*), for respondent.

September 14, 1922. BERTRAM C.J.—

I have every sympathy with the appellant in the case. There are very definite indications that he believed in good faith on the assurance of the canvasser Ponnambalam that an arrangement was made by which the exchange was booked as at the date of the contract. Nevertheless, his legal position is faulty on every side, and none of the strenuous efforts which Mr. Jayawardene has made on his behalf can avail to save him.

I confess that I do not understand how a person of his experience who had had numerous transactions with other European firms can have accepted the assurance which he says Ponnambalam gave him, that where it was arranged that the exchange should be booked as at the date of the contract this would not be mentioned in the contract. However, I will take it to be so, and deal with the legal points raised by Mr. Jayawardene.

The first of these points is that the plaintiff cannot sue at all, but only his correspondents in Holland. This proposition is entirely untenable. The plaintiff was doing what is done by merchants in Fort every day. He was ordering goods for a customer from abroad, and it was arranged that the price of the goods should be that at which they were invoiced to him, plus his commission. Under such circumstances the parties to the contract are the merchant and the purchaser. It would be preposterous if in respect of every such order the supplier abroad had to sue the customer of the commission merchant. The case cited by Mr. Jayawardena, *Miller, Gibb & Co. v. Smyth & Tyler, Ltd.*[1] does not support his proposition. The main point of that case is that where a contract is made on behalf of a principal abroad, a question of fact to be determined on all the circumstances of the case is whether the person liable upon that contract is the agent at home, or the principal abroad. Nor do the cases from our own Law Reports make the position any better. *Rahim v. Davoodbhoy*,[2] *Boysen v. Zameldeen*,[3] *Silva & Nagendra v. Haniffa*.[4] In all these cases the broker here was acting expressly on behalf of the principal abroad. In this case the plaintiff was not.

Mr. Jayawardene's second point is that on the defendant repudiating the contract and calling upon him to cancel it, plaintiff

[1] *(1917) 2 King's Bench, p. 141.*
[2] *(1917) 20 N. L. R. 286.*
[3] *(1913) 17 N. L. R. 346.*
[4] *(1926) 21 N. L. R. 468.*

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was bound to cancel it and to do his best to minimize the damage by telegraphing to his suppliers in Europe. It would certainly have shown much better feeling if the plaintiff had done so. If he had done so, I have little doubt that the damages would have been very much minimized. Defendant would, no doubt, have had to pay plaintiff's commission ; he also would have to pay the 20 per cent. deposited with the suppliers. Nevertheless, it is quite clear that plaintiff was not bound to take this course. It is settled law, laid down in all the text books, that where one party to an agreement repudiates it, the other is not bound to accept the repudiation. He may attend upon his contract, and hold the other party responsible and wait for the time of performance. If he does this, he is under no obligation to make any attempt to minimize damages, it is only where he elects to treat the repudiation as an immediate breach and to sue upon the contract at once that it becomes his duty to do his best to minimize damages. See *Mayne on Damages, 8th ed., p. 205 ; Benjamin on Sale, 6th ed., p. 935 ; Leake on Contracts, 5th ed., p. 619.* The recent case relied upon by Mr. Jayawardene, *Payzu, Ltd., v. Saunders,*[1] was a case of that description. That is to say, a case where the plaintiff elected to treat repudiation as an immediate breach.

The next point was that the canvasser Ponnambalam had ostensible authority to give assurances to the defendant that the exchange would be booked as at the date of the contract. The facts are against this suggestion. Mr. Jayawardene then says that even if Ponnambalam gave these assurances fraudulently, his principal is nevertheless liable. The principles laid down in the well-known case, *Berwick v. English Joint Stock Bank,*[2] if properly understood, are fatal to this proposition also. Ponnambalam neither actually nor ostensibly had authority to give any such assurance, and such assurances were not of the class of assurances which a person in his position as canvasser was entitled to give, nor is a canvassing agent in the same position as a confidential clerk of a firm of solicitors, left in charge of an important part of the work of the firm as in *Lloyd & Grace Smith & Co.*[3] All these points are fatal. One is that even if Ponnambalam had been impliedly authorized to give these assurances, it would not be possible in this way to annex a new and important term to a written contract, and, further, it seems clear on the correspondence in the evidence that this matter was compromised by agreement, that terms were arranged under which defendant waived his grievance ; the plaintiff relinquished his claim to commission, and the supplier abroad cancelled the order with regard to ten of the cases.

Under the circumstances I think that we have no alternative but to dismiss the appeal, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed

[1] *(1919) 2 King's Bench, p. 581.* [2] *(1867) L. R. 2 Exch. 259.*
[3] *(1912) A. C. 716.*