

Seng Djit Hin - - - - - *Appellant*

v.

Nagurdas Purshotumdas and Company - - - - - *Respondents*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS
(SETTLEMENT OF SINGAPORE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 20TH FEBRUARY, 1923.

Present at the Hearing :

VISCOUNT HALDANE.
LORD DUNEDIN.
LORD ATKINSON.
LORD WRENBURY.

[*Delivered by* LORD DUNEDIN.]

On the 17th June, 1917, a contract of sale of sugar was entered into between the appellant (seller) and the respondents (buyers) by exchange of letters in the following terms :—

“ Messrs. Nagurdas Purshotumdas & Co.
“ Present.

“ Singapore,
17th June, 1917.

“ Dear Sirs,

“ We have sold to you to-day 2,100 (two thousand one hundred) tons of new superior white sugar No. 26 at \$10·20 (Ten dollars and twenty cents) Singapore currency per Java Government picul c.i.f. Bombay in good condition.

“ Shipment : Shipment of above 2,100 tons from Java Northern ports July, August and September seven hundred tons monthly 1917.

“ Terms : Cash on full documents against payment.

“ (Signed) SENG DJIT HIN.”

“ Messrs. Seng Djit Hin,
 “ Present.

“ Singapore,
 17th June, 1917.

“ Dear Sirs,

“ We have purchased to-day from you 2,100 (two thousand one hundred) tons new superior No. 26 white sugar at \$10·20 Singapore currency per Java Government picul c.i.f. Bombay in good condition.

“ Shipment : Shipment of above mentioned 2,100 tons should be made from Java ports in the months July, August and September, 1917, each month seven hundred tons.

“ Terms : Cash on delivery of full document relating shipment.

“ (Signed) NAGURDAS PURSHOTUMDAS & Co.”

None of the sugar was delivered in the three months specified, but in October, 1917, the appellant delivered 265 tons which the respondents accepted without prejudice. In August, 1917, the appellant raised actions against the respondents for other goods sold and delivered to the respondents. This claim was admitted by the respondents and no question arose thereon ; but the respondents counter-claimed for short delivery of the sugar. The present appeal has only to do with the validity of the counter-claim. The appellant admits that no delivery under the contract had been made, but pleaded that he was excused on one of two grounds. First he said that, owing to impossibility of securing tonnage it had been impossible for him to perform the contract and that such impossibility excused him. The learned Trial Judge before whom the case depended, found that there was no such impossibility as in the circumstances of the case would at common law excuse from the performance of the contract. This view was upheld by the Court of Appeal, and the appellant has expressly stated that he does not rely upon this point before their Lordships sitting on this Board. The second ground of defence was as follows :—By section 5 of Ordinance VIII of 1909 of the Straits Settlements, revised in 1920, and to be cited as Ordinance No. III (Civil Law) it was provided :—

“ 5.—(1) In all questions or issues which arise or which have to be decided in the Colony with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by Statute.”

Now at the period in question there had been passed in England the Defence of the Realm (Amendment) Act, 1915, and the Courts (Emergency Powers) Act, 1917. By section 2 (2) of the former Act it is provided :—

“ (2) It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation, or restriction of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfilment of the contract so far as it is due to that interference.”

By section 1 (2) of the latter Act it is provided :—

“(2) Where, upon an application by any party to any contract whatsoever, the Court is satisfied that, owing to any restriction or direction imposed or given by or in pursuance of any enactment relating to the defence of the realm or any regulation made thereunder, or owing to the acquisition or user by or on behalf of the Crown for the purposes of the present war of any ship or other property, any term of the contract cannot be enforced without serious hardship, the Court may, after considering the circumstances of the case and the position of the parties to the contract and any offer which may have been made by any party for the variation of the contract, suspend or annul the contract or stay any proceedings for the enforcement of the contract or any term thereof or any rights arising thereunder on such conditions (if any) as the Court may think fit.”

and by section 3 it is provided :—

“(3) Where, before or after the passing of this Act, the non-fulfilment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order, or restriction of any Government department or of a competent naval or military authority made, issued, given or imposed for purposes connected with the present war, or with any direction or advice issued or given by any Government department with the object of preventing transactions which, in the opinion of the department, would or might be contrary to national interests in connection with the present war, proof of that fact shall be a good defence to any action or proceeding in respect of the non-fulfilment of the contract. A certificate by the appropriate Government department shall be sufficient evidence that such direction or advice was issued or given and with such object as aforesaid.”

The appellant averred that all available shipping for carrying sugar from Java to Bombay had been requisitioned by the Admiralty and that the inability to find tonnage was due to such requisition and that on this account he was excused performance. The learned Trial Judge gave effect to this plea. The Court of Appeal, by a majority, reversed, upon the grounds that the English Acts cited were not made available by the terms of the Civil Law Ordinance above cited. From this judgment appeal has been taken to His Majesty in Council.

The learned judges of the Court of Appeal based their judgments upon the view that the English statutes above cited were no part of the mercantile law which they thought was the law to be administered in terms of section 5 of the ordinance. Their Lordships are quite unable to agree with this view, which they think fails to appreciate that it is not the “mercantile law” but “the law” which is to be the same as the law which would be administered in England in the like case. The first thing to be settled is: Has a question or issue arisen in the Colony with respect to—here follow the enumerated departments of law and then come the general words “and with respect to mercantile law generally”? Now the question here to be decided in the Colony is a question as to the law of sale. No one can doubt that the law of sale is part of the mercantile law. If any proof of the use of such words is required it would be found in the title of “The Mercantile Law (Amendment) Act,” in two statutes of 1856, both of which especially deal with sale. That being settled the

section goes on to say not, as the learned judges seem to assume that "the mercantile law" (though indeed if it were so it would be doubtful if the result would be different) but that "the law" to be administered shall be the same as would be administered in England in the like case at the corresponding period. Now if the same question as to sale had to be decided at the same time in England it is clear beyond all doubt that the above cited statutes of 1915 and 1917 could be pleaded if the facts allowed of their application. That no other provision had been made by Colonial statute all the learned judges agreed, and the contrary has not been urged in this appeal.

As to the facts the learned Trial Judge found as follows:—

"Mr. Westerman, in Samarang, has given evidence as to the requisitioning of the ships of the Asiatic and British India Steam Navigation Company by the British Government during the three months in question and I find on the evidence that the performance of the contract was by this requisitioning rendered practically impossible without any default on the part of the plaintiff, who seems to have done his best to deliver the sugar even to the extent of trying to charter a ship from Messrs. Paterson, Simons & Company."

With this finding, which is not dissented from by the learned judges of the Court of Appeal, though the view of the majority made it unnecessary to decide the point, their Lordships agree. The learned counsel for the respondents attempted to show that the requisitioning was all done before the date of the contract, but in that he failed.

The last point taken by the respondents was that the Defence of the Realm Act, 1915, could not apply, because requisitioning of ships was not effected under the Defence of the Realm Consolidation Act or the Act of 1915 itself, but under the prerogative. Their Lordships consider it unnecessary to consider this question, because they think that the provisions of the Act of 1917 clearly apply and form a sufficient answer, for under section 1 (2) complete power is given to the Court to annul, and a defence to an action is tantamount to an application; and in addition section 3 applies in terms.

Their Lordships will, therefore, humbly advise His Majesty to allow the appeal and restore the judgment of the Trial Judge. The appellant will have his costs throughout.



In the Privy Council.

SENG DJIT HIN

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NAGURDAS PURSHOTUMDAS AND COMPANY.

DELIVERED BY LORD DUNEDIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1923.