Privy Council Appeal No. 27 of 1923.

D. Benaim and Company - - - - - - - *Appellants*

v.

Luigi Spiteri Debono (trading as L. Spiteri Debono and Company) - *Respondent*

(Claim—Beans.)

FROM

THE COURT OF APPEAL, MALTA.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 14TH FEBRUARY, 1924.

Present at the Hearing :

LORD ATKINSON.
LORD WRENBURY.
LORD DARLING.

[*Delivered by* LORD DARLING.]

This is an appeal from a judgment of the Court of Appeal, Malta. By a unanimous judgment (His Honour Sir M. A. Rafelo, President ; Dr. G. Agius and Dr. L. Camilleri) the Court reversed the judgment of the Commercial Court, Malta (His Honour A. Parnis) in favour of the appellants in an action in which the appellants were defendants and the respondent was plaintiff.

The action was brought by the respondent against the appellants in the Commercial Court, Malta, on a contract for the sale by the appellants to the respondent of 300 bags of beans, f.o.b. Gibraltar, under the condition that the goods were to be of superior quality and of large size, "white superior, large." The goods were delivered and shipped to Malta and the respondent subsequently claimed rescission of the contract and damages. The questions for decision are (1) whether on the facts the respondent was entitled to rescind ; (2) whether if he had such right he has not lost it by his acts and conduct in accepting dealing

with and retaining the goods. These were the issues raised in the pleadings and considered in the judgments. In addition to the above, this case involves the question of whether the contract of sale is governed by the law of Gibraltar or Malta.

The contract is contained in a letter and telegrams which passed between the appellants and the respondent dated the 5th, 6th, 8th, 10th, 11th and 12th December, 1917, and was confirmed in a letter from the respondent to the appellants dated the 12th December, 1917. By the contract the appellants agreed to sell to the respondent 300 bags of haricot beans, "white superior, large," each bag to contain 100 kilos. at the price of 128*s*. per bag, f.o.b. Gibraltar. Payment was to be made against shipping documents through a bank in Gibraltar.

A credit in respect of the beans was opened by the respondent on the 12th December, 1917, and later extended till the 28th February, 1918, for £1,920, plus freight according to bill of lading. On the 5th March, 1918, the respondent telegraphed to the appellants: "Wire if haricots shipped, otherwise cancel." The credit was not extended and no sum was paid thereunder. The goods, however, were then in lighters and the respondent on the 6th March, 1918, through the Banco di Roma, Malta, instructed the Anglo-Egyptian Bank, Gibraltar, to have the goods examined on their behalf. The examination was duly made and on the 12th March, 1918, the Anglo-Egyptian Bank reported by telegram to the Banco di Roma that the goods had been examined by a broker who reported they were in sound and saleable condition. The report was communicated verbally to the respondent by the Banco di Roma. The goods were shipped and on the 26th March, 1918, arrived in Malta, consigned to the Anglo-Egyptian Bank there, who were instructed not to deliver them without payment. The vessel carrying the goods was consigned to the Admiralty at Malta, and on her arrival the respondent obtained possession of them from the Naval store officer without payment. The goods were invoiced to the respondent at the price of £2,221, which included the sum of £248 in respect of freight. The respondent has never paid the invoice price or any part of the same to the appellants.

Prior to the arrival of the goods in Malta the respondent had resold the beans, in particular, 5 bags each to one Borg and one Spiteri. Borg and Spiteri refused to take delivery of the goods bought by them and brought an action against the respondent in the Commercial Court, Malta, claiming rescission of the sales on the ground that the goods were different from the quality agreed upon. Referees appointed by the Court in that action reported that the quality of the goods in question "differed from the quality of those sold in the first place, having regard to size which should be three times as large, and in the second place, having regard to colour which should be somewhat whiter." Basing itself on this report the Commercial Court, by judgment dated the 7th May, 1918, declared the sales rescinded and awarded

damages against the respondent in the present action. The respondent appealed against that part of the judgment which awarded damages and on the 11th April, 1919, the Court of Appeal, Malta, reversed that head of the judgment of the Commercial Court which awarded damages on the ground that there had been a fall in price and no damage had been sustained. No appeal was made against the first head of the judgment which declared the sales rescinded.

On Borg and Spiteri refusing to take delivery of the goods bought by them, and subsequently to their commencing their action against the respondent, the respondent on the 10th April, 1918, made a judicial deposit of the goods bought by him from the appellants and lodged a protest on the ground that his sub-purchasers had refused to accept the goods as they were not of the agreed quality. This was the first step taken by the respondent which purported in any way to reject the goods.

On the 16th October, 1918, the Commercial Court, Malta, ordered the judicial sale of the goods.

The action was heard in the Commercial Court, Malta, and judgment delivered on the 28th September, 1921, by His Honour A. Parnis in favour of the appellants. The judgment decided :—

(i) that in the case of *Borg* v. *Spiteri Debono* the contract was made in Malta, and that accordingly the usages of the Maltese market as to the description of the goods must be applied in that case ;

(ii) that in the present case on the contrary the contract was made in Gibraltar, and that it was in Gibraltar that payment and delivery were to be effected ;

(iii) that it had not been proved that the goods were not of the quality promised according to the meaning attributed to the description by the usages of the Gibraltar market ;

(iv) that the respondent by means of an agent, examined the goods in Gibraltar before shipment ; that though the examination in terms referred only to the condition of the goods, the appellants were entitled to assume that the goods had been approved by the respondent ;

(v) that the judicial deposit of the goods was made by the respondent on the 10th April, 1918, that is when there had been a fall in the market and after the action of *Borg* v. *Spiteri Debono* had been commenced.

The respondent appealed to the Court of Appeal, Malta, which Court, on the 5th April, 1922, reversed the judgment of the Commercial Court allowing the appeal of the respondent and entering judgment for the respondent with costs. The judgment of the Court of Appeal decided :—

(i) that having regard to the evidence adduced both in this case and in the case of *Borg* v. *Spiteri Debono*, it was proved that the goods were not conformable as to size to the quality agreed upon ;

(ii) that it was not proved that the designation " beans of large size " had a meaning in the Gibraltar market different from that existing in the Malta market;

(iii) that the expert appointed to examine the goods in Gibraltar on behalf of the respondent did not have any other charge than that of seeing whether the goods were sound in condition and merchantable; and that he expressed no opinion from which it could be inferred by either the respondent or the appellants that the goods were of the size agreed upon;

(iv) that the respondent had made a judicial deposit of the goods as soon as he learned that they were not accepted by his sub-purchasers; and that no circumstance had arisen from which it could be understood that the respondent had first approved and accepted the goods and then deposited the same because there had been a fall in the market.

It appears to their Lordships that the contract between the parties is governed by the law of Gibraltar—by virtue of the Ordinance and for the reasons set forth in the judgment delivered in the appeal between these same parties concerning the purchase of anchovies. It appears to them that the respondent had and availed himself of a sufficient opportunity to inspect, and if necessary to reject, the goods at Gibraltar. If his agent for inspecting was negligent in the performance of his duty, as is suggested in the proceedings, that cannot give the respondent a right afterwards to reject goods which have become their own.

Their Lordships will, therefore, humbly advise His Majesty that this appeal be allowed with costs throughout, and the judgment of the Commercial Court of Malta restored. Any costs paid, under the order of the Court of Appeal of Malta, by the appellants to the respondent to be returned.

In the Privy Council.

D. BENAIM AND COMPANY

v.

LUIGI SPITERI DEBONO (TRADING AS L. SPITERI DEBONO AND COMPANY.

DELIVERED BY LORD DARLING.

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