16, 1955

~~G.K.1.D.Z~~

No. 40 of 1954.

In the Privy Council.

UNIVERSITY OF LON
W.C. 1.
-4 JUL 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES
43551

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

ABDUL HAMID and ABDUL LATIFF, both carrying on business in partnership under the name style and Firm of "ABDUL LATIFF ABDUL HAMID" (Defendants) . . . . *Appellants*

10 AND

ODHAVJI ANANDJI & CO. LIMITED (Plaintiffs) *Respondents.*

CASE FOR THE APPELLANTS.

RECORD.

1. This is an Appeal by leave of the Supreme Court of Ceylon from a judgment and decree of that Court dated the 9th and 17th March, 1953, respectively dismissing with costs the appeal of the Appellants from a judgment and decree of the District Court of Colombo dated the 6th February, 1951, whereby the Appellants were ordered to pay to the Respondents the sum of Rs.36,699.53 together with interest and costs. pp. 75–81. pp. 62–71.

2. By their Plaint filed the 16th May, 1949, the Respondents (who are a corporation carrying on business in Mombasa) claimed against the Appellants (who are partners carrying on business in Colombo) the sum of Rs.37,525 as damages for non-acceptance of 60 tons of cowpeas sold by the Respondents to the Appellants under a written contract dated the 24th December, 1946. By their Answer the Appellants claimed that they lawfully rejected the cowpeas on the grounds that they did not correspond with the sample, were not of merchantable quality, were not fit for human consumption and were not in the terms of or in accordance with the contract. Additional District Judge V. Manickkavasagar, the learned trial judge, held that none of these defences had been made out, and it is not now sought to set this ruling aside. p. 10. p. 15. (20, 30)

3. The sole questions for determination upon this Appeal concern the measure of damages applicable to the case, and may be summarised as follows :—

(A) whether the correct measure of damages was the difference between the contract price and the market price of the cowpeas at the time when the Appellants refused to accept delivery ;

(B) whether, if this criterion was not applicable, there was evidence that the Respondents had acted reasonably under their duty to mitigate their damages by not reselling the cowpeas (which were perishable) until periods of between 2 to 8 months had elapsed after the Appellants had refused to accept delivery ;

(C) whether the difference between the price fetched at the resale by the Respondents and the contract price was or could have been the loss directly and naturally resulting in the ordinary course of events from the Appellants' breach of contract.

p. 12.

4. The contract was c.i.f. Colombo and provided for the shipment of the cowpeas from Mombasa to Colombo on the s.s. June Crest "loading at present." In fact the June Crest sailed on the 28th December, 1946. Payment for the cowpeas was to be made by an irrevocable Letter of Credit. On the 30th December, 1946, the Respondents drew a Bill of Exchange on the Appellants and transmitted it together with the Bill of Lading, Insurance Policy and Invoice to the National Bank, Colombo, for presentation to the Appellants. 10

p. 122.
pp. 92, 107, 119.

5. On the 1st January, 1947, the Appellants, not knowing that the June Crest had sailed, informed the Respondents that they did not require the cowpeas, so that, as the Secretary of the Respondents said in evidence, they knew by the 1st or 2nd January, 1947, that the cowpeas would not be accepted by the Appellants. Nevertheless on the 2nd January, 1947, they asked the Appellants by cable why the requisite Credit had not been opened in their favour. 20

p. 26, ll. 17–21.
p. 26, ll. 23–25.
p. 123.

6. The June Crest reached Colombo on the 13th January, 1947, and took about 15 days to complete unloading. Meanwhile the Appellants had refused to accept the shipping documents or to honour the Bill, which was noted for non-payment on the 29th January, 1947. On that date the Respondents warned the Appellants by cable that if the Bill was not paid within 48 hours they would sell the cowpeas at market price. On the 4th February, 1947, they sent another cable to the Appellants, on this occasion announcing their intention to sell at market price if the Bill was not paid within 24 hours. In spite of the fact that the Appellants did not reply to either of these cables or pay the Bill or take delivery of the cowpeas, the Respondents took no consequent action until the 5th March, 1947, when they caused their Proctor to write to the Appellants that if the Bill was not met within 24 hours they would dispose of the cowpeas and hold the Appellants liable for any loss. 30

p. 39, ll. 12–13.
p. 122.
p. 135.
p. 136.
p. 22, l. 34.
p. 137, l. 21.

7. During February, 1947, the cowpeas were cleared from the dock warehouses by the Respondents' clearing agents, Messrs. E. B. Creasy and Co. Ltd., who delivered them from their store to Messrs. Popatlal and Co. in two consignments, the first on the 3rd April and the second on the 12th July, 1947. The cowpeas were sold by Messrs. Popatlal on various dates between the 3rd April and the 1st September, 1947, inclusive. The price realised was set off after deduction of expenses against the contract price for the purpose of ascertaining the damages suffered by the Respondents. 40

p. 137, l. 1.
p. 143.

8. The learned trial judge expressly found (what was more or less common ground) that cowpeas are of a perishable nature; that weevils begin to germinate in them within two or three months after they are harvested; that the cowpeas in this case were harvested in November, 1946; and that by the end of January, 1947, they were in danger of being attacked by weevils and that it was not unlikely that by early February the attack had begun. There was also evidence that there was a heavy demand for cowpeas in Ceylon during 1946, the market falling steeply in the early part of 1947, but the learned judge made no finding on this point.

p. 69, l. 19.
p. 69, l. 21.
p. 69, l. 28.
p. 69, ll. 29–33.
p. 20, l. 13.
p. 34, ll. 16–34.

10 9. In paragraph 7 of their Plaint the Respondents alleged that the Appellants by their refusal to take delivery of the cowpeas had caused the Respondents loss or damage in the sum claimed. The Appellants in paragraph 6 of their Answer denied the averments in paragraph 7 of the Plaint.

p. 11, l. 13.
p. 16, l. 27.

10. During the trial several witnesses on behalf of the Appellants gave evidence as to the market price of cowpeas at the material times. When the first of these witnesses, H. D. Marker, was called, objection to his evidence was taken by Counsel for the Respondents. Counsel for the Appellants replied (inter alia) as follows :—

20 "The question as to what the market price is, is necessary to enable the Court to assess the damages. In assessing the damages, the market price is relevant data."

p. 47, l. 36.

Counsel for the Respondents replied that "this is a c.i.f. contract and the question of the market price is irrelevant. In answer to me he states that the National Bank had the goods sold and he had given credit to the net amount realised less deductions and he has come into Court for the balance." The learned judge, in allowing the witness to be called, made the following observations :—

p. 48, l. 10.

"This particular witness is being called to speak to the market 30 price of cowpeas; it is submitted that the evidence in regard to the market price is relevant in order to enable the Court to arrive at a decision as to what amount, if any, would be due to the Plaintiffs. Counsel for the Plaintiffs pressed on me the argument that it is irrelevant; it is a moot question whether the evidence is relevant or irrelevant and I do not feel justified in considering this question at this stage; rather I would assume the relevancy of the evidence at this stage and if after hearing Counsels' addresses at the end of the case, I hold that it is irrelevant, then all the evidence regarding the market price can be shut out."

p. 48, l. 39.

40 11. This witness, H. D. Marker, who was a partner in a firm of commission agents and brokers, gave the following figures based upon the transactions of his firm as the market price of cowpeas per bag of 200 pounds :—

1947	February	Rs.43 to 45.	p. 49, ll. 33–35.
	March	Rs.45 to 50.	p. 50, ll. 13–18.
	April	Rs.42.	p. 52, l. 14.

p. 52, l. 40.

He also stated that when 50 per cent. of the contents of a bag were attacked by weevils the weight would be reduced by 30 to 35 pounds. His firm had no transactions in cowpeas in January, 1947.

p. 52, l. 17.

12. The second Appellant produced his ledger and cash memos and gave the following figures of the prices obtained by the Appellants for the sale of assorted cowpeas :—

p. 58, ll. 10–22.

1947 February About Rs.50.
March Rs.43 to 50.

13. In spite of this evidence and of his observations quoted above the learned judge did not in his judgment refer at all to the market price 10 of cowpeas or indeed to the measure of damages to which he held that the Respondents were entitled. It appears from his judgment that, having rejected the defences put forward by the Appellants to the alleged breach of contract, he wholly omitted to consider the question of the quantum or measure of damages and merely assumed that (except for a small deduction in respect of income tax) the Respondents were entitled to the sum which they had claimed. On p. 64, l. 3 he states that after the Bill was noted for non-payment, the Respondents " thereafter through their bankers had the goods sold by Popatlal and Co. and the sale realised a sum of Rs.12,550.99 ; expenses amounted to Rs.7,441.90." On p. 69 20 l. 33 the learned judge, having mentioned the possibility that early in February weevils might have begun to attack the cowpeas, continued :—

> " the plaintiff Company cannot be blamed for this, the delay was the defendants' "

and on l. 40—

> " . . . the plaintiff Company cannot be blamed if the cowpeas they had sent were in damaged condition at the beginning of February due to attack by weevils."

p. 70, l. 10.

Apart from these passages there is nothing in the learned judge's judgment which can be construed as dealing with the question of damages, and at 30 the end of his judgment he answered issue 8 (which raised the question whether the Respondents were entitled to claim the amount set out in the Plaint) in the affirmative without giving reasons.

p. 78, l. 6.

14. The question of the amount of damages was argued on appeal before the Supreme Court of Ceylon. Gratiaen J. in the course of his judgment said that on the issue as to damages the learned trial judge " has not discussed the evidence in quite so much detail, but it is safe to assume, I think, that in his opinion the Company was reasonably entitled to claim the whole of the loss which it had in fact sustained in the transaction." The learned appeal judge then posed the question, " Can 40 it be said that, having regard to the learned judge's findings of fact and also to the findings which are implicit in his judgment, there was evidence upon which he could properly have decided that the Company's claim was excessive ? " He nowhere specified the implicit findings to which he was referring, but in the submission of the Appellants substituted findings of his own which were not supported by or were contrary to the evidence.

p. 78, l. 24.

15. During the hearing of the appeal it was agreed that " the decisive date " when the Appellants " must be regarded as having finally committed a breach of their contract " was the 5th or 6th February, 1947. The learned appeal judge stated that the market value of the cowpeas at that date " was not capable of precise ascertainment." He then expressed the view that a prospective buyer would be " considerably influenced " by the " risks of shortages, pilferage and deterioration from contamination," and reached the conclusion that " from a commercial point of view there was virtually no ' ready market ' for a quantity of 60 tons at all." It is submitted by the Appellants that, even if the Appellate Court was entitled to make a finding of fact upon a material issue which the learned trial judge had omitted to decide, these findings were manifestly contrary to the evidence given on behalf of both parties, and indeed to the finding of the learned trial judge that the cowpeas were in accordance with the contract.

p. 78, ll. 31–37.
p. 79, l. 27.
p. 79, ll. 32, 35.
p. 79, l. 40.

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16. The learned appeal judge further held that the Appellants should have give more precise evidence of the amount realised by the Appellants on the resale of another consignment of 25 tons of cowpeas sold to them by the Respondents and shipped in the June Crest. In fact the second Appellant gave in evidence the prices paid in respect of all the cowpeas delivered to the Appellants from the June Crest.

p. 79, l. 44–
p. 80, l. 7.
p. 59, ll. 20–23.

20

17. Finally the learned appeal judge refused to order a retrial on the question of damages on the ground that six years had elapsed since the contract was repudiated.

p. 80, l. 22.

18. Gunsekera J., the other judge constituting the Supreme Court, agreed with the judgment of Gratiaen J.

p. 80, l. 20.

19. Taking the lowest figure, given by the witness H. D. Marker, namely Rs.43 per bag, as being the market price of the cowpeas on the 5th or 6th February, 1947, it is submitted that the damages suffered by the Respondents were the difference at that date between the contract price (Rs.41,934.12) and the market price (Rs.27,778) namely Rs.14,156.12.

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20. The Appellants humbly submit that the decrees of the Supreme Court of Ceylon and of the District Court of Colombo were wrong and should be set aside and that judgment should be entered for the Respondents for the sum of Rs.14,156.12 or that a new trial should be ordered on the issue of damages and that the Respondents should be ordered to pay the costs of this Appeal and of the appeal before the Supreme Court of Ceylon for the following among other

REASONS

40

(1) BECAUSE the measure of the Respondents' damages was the difference between the contract price and the market price at the time when the Appellants refused to accept delivery.

(2) BECAUSE the Respondents under their duty to mitigate their damage ought reasonably to have effected a resale at the time when or as soon as possible after the Appellants refused to accept delivery.

(3) BECAUSE it was agreed that the Appellants finally repudiated the contract not later than the 6th February, 1947, and the lowest estimate given of the market price in February, 1947, was Rs.43 per bag.

(4) BECAUSE the amount of damages awarded by the learned trial judge did not represent the loss directly 10 or naturally resulting in the ordinary course of events from the Appellants' breach of contract.

(5) BECAUSE the learned trial judge did not consider or apply the lawful measure of damage.

(6) BECAUSE the learned appeal judges wrongly inplanted their own findings of fact in the judgment of the learned trial judge, which findings were contrary to the evidence.

(7) BECAUSE the reasons given by the learned appeal judges for dismissing the appeal were bad in law.

JOSEPH DEAN. 20

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