Privy Council Appeal No. 18 of 1958

Hong Guan & Company Limited - - - - - - - *Appellants*

v.

R. Jumabhoy & Sons Limited - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF THE COLONY OF SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH APRIL, 1960.

Present at the Hearing:

LORD TUCKER

LORD JENKINS

LORD MORRIS OF BORTH-Y-GEST

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

This is an appeal by leave of the High Court of the Colony of Singapore, Island of Singapore, against the judgment of the Court of Appeal of the said High Court dated the 15th November, 1957 (Rigby and Wee Chong Jin, JJ., Knight Ag., C.J., dissenting), dismissing with costs the appeal of the appellants from the judgment of Tan Ah Tah, J., dated the 9th October, 1956, whereby the claim of the appellants (the plaintiffs in the action) was dismissed with costs.

The claim made in the action was for damages for breach of contract of sale. The appellants wished to purchase 50 tons of Zanzibar cloves. It was their practice to buy goods in bulk and to make contracts of sub-sale also in bulk. The respondents, according to the testimony of Mr. Jumabhoy, their Chairman of Directors, were, down to December, 1950, the biggest importers and stockists of cloves in Singapore. Mr. Jumabhoy stated in his evidence that there are two crops of cloves in Zanzibar in a year: one begins to come in July and the other, which is larger, begins to come in September. He stated that the total crop for the year 1949 was about 7,000 tons and that the 1950 crop was three-and-a-half times larger. He further stated that cloves are usually re-exported from Singapore to Java, there being almost no use for cloves in Singapore. The only type of cloves exported to Singapore for use in Indonesia is the particular type known as Second Grade Zanzibar cloves. The incidence of rain in Zanzibar, particularly if it comes earlier than expected, may affect the picking and accordingly the selling by suppliers and the exporting.

The contract which was sued upon was dated the 7th November, 1950, and, bearing the respondents' number—number 106—was in one of a variety of forms used by the respondents. Its terms were as follows:—

" Bought of R. JUMABHOY & SONS, LTD.
No. 24, MALACCA STREET.
Sold to MESSRS. HONG GUAN & CO., LTD.
24, TELOK AYER STREET.
Term: Cash in Silver or Bank Notes:
Subject to conditions of sale of The Indian Chamber of Commerce, Singapore.

50 Fifty Tons Zanzibar Cloves Second Grade, December Shipment @ $94½ per picul ex buyers godown.

Delivery to be taken within . . . days from date. In default of delivery being taken within the stipulated time, the undersigned have the option, without any notice to the Purchaser, of either cancelling the above sale, or of selling the goods by public or private sale at the risk and expense of the Purchaser, or of retaining them, and if the goods are retained the usual charges for storage and fire insurance (on the value of the said goods) will be charged and also interest at the rate of 12 per cent per annum from the date on which delivery should have been taken.

Subject to force majeure and shipment.

It is at the option of the seller to demand cash before or any time after delivery of goods.

N.B.—Buyers must examine the goods before delivery, and no complaint may be made after delivery of same.

Bearing interest at 24% per annum after due date of this order.

Tare Four Catties per Bag.

Broker for Vendor and Purchaser. Sd. R. Jumabhoy

Sd. Illegible R. JUMABHOY & SONS LTD."

In fact the appellants did not receive any cloves from the respondents. A letter, dated the 29th December, was sent to them in these terms:

"RODYK & DAVIDSON

Our Ref: FGV/F

29th December, 1950.

Dear Sirs,

Contract No. 106—50 tons

Zanzibar 2nd grade cloves

We are directed by your sellers, Messrs. R. Jumabhoy & Sons Ltd., to inform you that your shipment was not effected by the Zanzibar suppliers.

Your contract was made subject to force majeure and shipment in consequence of which please consider your contract as cancelled.

Yours faithfully,

Sd. Rodyk & Davidson.

Messrs. Hong Quan & Co. Ltd.,

14, Telok Ayer Street,

Singapore."

On the 24th November, 1950, the appellants had entered into two contracts of sale, each for 25 tons of Zanzibar Second Grade Clovers. One contract was with Messrs. Makhanlall & Co. and the other was with Messrs. Panachand & Co. Amongst other terms each contract included the following:—

"Quality: Zanzibar Second Grade—as received from the Steamer.

Price: S.S.$99/- per picul (ninety nine only).

Shipment: December 1950.

Delivery: At buyers godown.

Remarks: Subject to the safe arrival of the steamer and alls force majeures.

. . . . . ."

Evidence was given at the hearing of the action that the respondents had been informed by telephone that these two contracts of resale had been entered into. That evidence, contradicted by the evidence of Mr. Jumabhoy, was not accepted by the trial judge who held that the respondents were not aware of the two contracts of resale until more than a month after they had been entered into and until the time when the appellants were contemplating bringing legal proceedings.

The respondents effected shipments from Zanzibar as follows:—They shipped 300 tons on a ship called the Tjibadak. Though the actual date of sailing of that ship from Zanzibar was the 1st December, 1950, it was held, and it is not now disputed, that such shipment was properly to be regarded as a November shipment. The ship arrived at Singapore on the 25th January, 1951. The only December shipment on behalf of the respondents was of a quantity of 50 tons. It had in fact been hoped that this quantity would have been shipped on the Tjibadak. This quantity was actually shipped on the Ettrick Bank, which, sailing from Zanzibar on about the 21st December, 1950, reached Singapore on the 20th January, 1951, having overtaken the Tjibadak.

Inasmuch as the appellants did not receive any cloves from the respondents the appellants were in turn unable to deliver any cloves to Messrs. Makhanlall & Co. or to Messrs. Panachand & Co. In response to the enquiries which these sub-purchasers addressed to the appellants, the solicitors for the appellants stated (in letters dated the 18th January, 1951): "Our Clients have pressed Messrs. Jumabhoy & Sons Ltd. for delivery of the cloves but they replied on the 29th December, 1950, to say that the Zanzibar suppliers have not effected our clients' shipment of cloves and our clients' contract with them must be considered as cancelled." Thereafter the appellants paid compensation to the two firms. Through what was called the respondents' arbitration it was agreed that the sum to be paid by the appellants to Messrs. Makhanlall in full settlement of their claim should be $28,000. That sum was paid as was likewise a sum of $15,000 to Messrs. Panachand & Co. with whom it was agreed that such sum would be accepted in full settlement.

The appellants brought proceedings against the respondents and by their Statement of Claim dated the 7th April, 1951, claimed the sum of $113,820 as damages by reason of the failure of the respondents to give delivery of the cloves referred to in the contract of the 7th November, 1950. The sum claimed was the difference between the market price (in December, 1950, and January, 1951) which was said to be $230 per picul, and the purchase price. The effective paragraph in the Defence of the respondents delivered on the 28th June, 1951, was in these terms: "Defendant states that the contract was made subject to force majeure and shipment and that no shipment of the goods contracted to be sold took place." When the action came on for trial in October, 1955, the appellants were given liberty to amend their Statement of Claim and the trial was adjourned. The appellants added to their Statement of Claim by pleading their contracts of sub-sale with Messrs. Makhanlall and Messrs. Panachand and the settlements they had effected and claimed the amounts paid under these settlements together with the amounts of costs they had paid and also their loss of profit, all by way of special damages. The appellants limited their claim to the sum of $48,280 being the amount of the special damage shown in the amended Statement of Claim. The claim for damages on the basis of the difference between the contract price and the market price remained—but the amount of such claim was limited to $48,280.

Apart from questions relating to damages the issue in the action was that which was raised in the paragraph in the Defence set out above. The respondents relied upon the words "Subject to force majeure and shipment": they claimed that no shipment of the goods contracted to be sold took place.

In order that the reasoning of the judgments under review may be understood it is necessary to make brief reference to certain other arrangements made and other commitments entered into by the respondents. As will be seen, however, these were of no concern to the appellants.

In November, 1950, the respondents entered into contracts (some 16 in number) to sell to various buyers various quantities of cloves, which in total amounted to approximately 760 tons. Such cloves were all to be of November shipments. On various dates (mostly in November, 1950) the respondents entered into contracts (some 13 in number) to sell various quantities of cloves, amounting in total to 375 tons, which were to be of

December shipments. In November, 1950, the respondents entered into three contracts (being two in addition to the contract with the appellants now being considered) to sell Zanzibar cloves December shipment. In total these three contracts amounted to 125 tons. There were various differences in regard to the conditions which appeared in the various contracts.

After the respondents became aware that 300 tons were to arrive on the Tjibadak and 50 tons on the Ettrick Bank they consulted their solicitors as to what they should do. In the result, as was stated in his judgment by Tan Ah Tah, J., the whole of the 300 tons carried on the Tjibadak were delivered to the buyers who were expecting the November shipments. As the total quantity to be delivered to these buyers was approximately 760 tons the respondents had to pay compensation for short delivery. As to this, Mr. Jumabhoy, in his evidence, said that in regard to the "November contracted goods" there were deliveries to the respective buyers proportionately. He said: "I did not take any profit by selling cloves at the market price which was then very high. I delivered the goods to buyers at contract price." Of the 50 tons carried on the Ettrick Bank 4 tons were delivered to buyers of November shipments while the remaining 46 tons were delivered to buyers of the December shipments which totalled 375 tons, in part performance of the contracts of sale. There was, therefore, a balance of 329 tons due to be delivered to such buyers. The learned trial judge held that in order to satisfy the claims of these buyers the respondents either had to buy cloves in Singapore for delivery to them or had to pay them compensation.

The learned trial judge held that the respondents were protected from liability by reason of the operation of the words of the contract. He based himself largely upon the judgment of Porter, J. (as he then was) in the case of *Hollis Bros. & Co. Ltd.* v. *White Sea Timber Trust Ltd.* [1936] 3 A.E.R. 895. In that case the parties had entered into a contract for the sale of parquet blocks c.i.f. for shipment from a port in the Arctic Circle which was only open to shipping for about one month in the year. In respect of one parcel of the blocks there was an undershipment of blocks of a particular size. There was a clause in the contract which provided: "In the event of undershipment of any item buyers are to accept or pay for the quantity shipped but have the right to claim compensation for such short shipment". There was also a clause which read: "This contract is subject to sellers making necessary chartering arrangements for the expedition and sold subject to shipment any goods not shipped to be cancelled." An arbitrators' award in favour of buyers was subject to the opinion of the Court on the question whether the buyer's right to claim compensation for short shipment was negatived by the words "sold subject to shipment any goods not shipped to be cancelled". In the context of that case, Porter, J. rejected the view that those words could be given the meaning that the sale was subject to the ability of the sellers to ship and that there was cancellation of any goods in respect of which there was inability to ship. He held that the words "subject to shipment" meant "provided the sellers in fact ship" and that there was an option in the sellers to ship or not to ship. He held, however, that if the goods were shipped they had to be attributed to the contract and that the sellers could not treat them as free goods unattributed to any contract. He said: "My view is that if they have shipped the goods the sellers are obliged, at any rate if they have not been shipped in fulfilment of other contracts, to supply them under this contract."

Basing himself upon this case the learned trial judge considered that the 300 tons of cloves carried on the Tjibadak and the 50 tons carried on the Ettrick Bank were shipped in fulfilment of definite contracts which had been entered into by the respondents and which were subject to no condition as to shipment. He held that the respondents were under no obligation to supply the cloves to the appellants.

One question raised in this appeal is whether apart from questions of construction it is correct on the facts to say that the 50 tons were shipped in fulfilment of definite contracts.

In the Court of Appeal Wee Chong Jin, J. agreed with the judgment of the learned trial judge. Rigby, J. was also in agreement. He considered that the learned trial judge was justified in holding that the total quantity of 350 tons carried on the two vessels was clearly shipped in fulfilment of definite contracts which contained no condition as to shipment. Rigby, J. was further of the opinion that the presence of the words "Subject to shipment" had the result that there was no more than an executory and unenforceable agreement which would only be converted into a valid contract of sale between the parties by the seller exercising his option to ship coupled with some evidence, direct or circumstantial, that the goods shipped were intended to be appropriated to that contract. Knight Ag, C.J. was of the contrary opinion. He said: "As I see it the appellants are right and the words 'subject to shipment' must be strictly construed and can only mean 'subject to shipment of 50 tons in December'—which shipment was in fact made to the respondents." He also said: "If the respondents wished to cover themselves against a failure to obtain the cloves in Zanzibar why did they not say in the contract 'subject to shipment of 350 tons'—or whatever numbers of tons it was that they required to fulfil *all* their undertakings? Again if the respondents meant to contract with the appellants only if they obtained the cloves and gave no undertaking that they would obtain them—surely this too could have been very simply embodied in the contract?"

Mr. MacKenna, for the appellants, submitted that the phrase "subject to shipment" contemplated a failure to ship which was beyond the control of the respondents and which might occur despite the exercise of reasonable diligence to effect shipment. He submitted that it was for the respondents, if they sought the protection of the contractual clause, to establish that they had used reasonable diligence, which, he submitted, they had failed to establish. In reliance upon his submission that the contractual clause did more than to give the respondents an option whether to ship any goods or not, he referred to *Star Public Saw Mill Co.* v. *Robert Bruce & Co. Ltd.* 17 Ll. L. Rep. 7, and *Gray* v. *Slater, Birds & Co.* 19 Ll. L. Rep. 59, and to cases where contracts were made subject to import or export licences being obtained. Counsel for the respondents referred to authorities such as *Kokusai Kisen Kabushiki Kaisha* v. *Johnson* 8 Ll. L. Rep. 434. In that case there was a charter which had the words "This charter is concluded subject to stem same to be confirmed in London not later than Monday the 7th instant". In the circumstances of that case Rowlatt, J. held that it would be improper for him to read in a qualification that the words should only take effect if it could be shown that the charterers had taken all due measures to try to arrange a stem. Their Lordships were also referred to various authorities relating to the construction of phrases bearing some measure of resemblance to that now under consideration: but cases which relate to the construction of other words in other contexts do not yield effective guidance. It must furthermore be borne in mind that the clause now under consideration is not "subject to shipment" but "subject to force majeure and shipment". There is, therefore, a double barrelled condition in which there is a juxtaposition of "force majeure" and of "shipment". Having regard to this consideration their Lordships think that the clause in the contract should be construed as meaning that the contract was (*a*) conditional upon the sellers not being prevented by circumstances amounting to force majeure from carrying it out and (*b*) conditional upon the sellers being able to procure the shipment in December, 1950, of cloves to the quantity and of the description referred to in the contract. So far as the clause deals with force majeure it appears to be designed to protect the respondents from liability in the event of their being prevented from performing the contract by circumstances beyond their control. It seems to their Lordships to be in consonance with this to construe the second branch of the condition as

being designed to protect them from liability in the event of their being prevented from carrying out the contract through inability to procure the shipment. If the words were to be construed as covering a situation when shipment did not take place merely as the result of the arbitrary choice of the vendor, then there would be no contractual force in the document, which would merely give an option to the vendor. There may be cases where words in a contract will in certain events provide an excuse for a vendor who fails to deliver. Thus in *Tennants (Lancashire) Limited* v. *C. S. Wilson and Company Limited* [1917] A.C. 495 there was a condition in the contract which provided that " deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as . . . war . . .) causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article ". So in *Pool Shipping Co. Ltd.* v. *London Coal Co. of Gibraltar Ltd.* [1939] 2 A.E.R. 432 there was an exceptions clause in wide terms under which the Court felt entitled to look beyond the buyer and seller and to consider the sellers' commitments under contracts with other buyers. There are no words in the present contract which enable the respondents to excuse their failure to deliver by reference to their other commitments.

The construction of the clause set out above seems to their Lordships to produce a more reasonable result than other suggested constructions. It would be strange if the clause had to be construed as making the contract conditional upon (*a*) the sellers not being prevented by force majeure from carrying it out and (*b*) the sellers choosing to ship the cloves which they were to be free to do or not to do at their own will and pleasure. It would be additionally strange if, following upon the provision against the consequences of force majeure in its first branch, the second branch of the condition went on to make the contract conditional on the sellers choosing to ship the cloves and thinking fit to allocate them to the contract which they were to be under no obligation to do. It seems unlikely that a clause would be framed to provide that force majeure was to excuse a contracting party from doing that which he was under no obligation to do. In the courts below the appellants appear to have relied mainly upon a submission that even if the respondents were free to ship or not to ship as they chose they became contractually bound if they did in fact ship. The respondents, on the other hand, argued that the contract was only binding in the double event of the sellers in fact shipping cloves and allocating a sufficiency of the cloves shipped to this particular contract. The undisputed facts show that the respondents were able to ship and did in fact in December, 1950, ship cloves to the quantity and of the description set out in the contract for the 7th November, 1950. The shipment by the respondents of 50 tons shows that shipment of the goods contracted to be supplied was not prevented by circumstances beyond their control. The condition, as their Lordships think it should be construed, was therefore satisfied. Stated otherwise the respondents did not bring themselves within the excusing provision of the clause. It follows that when the respondents failed to deliver to the appellants the cloves contracted for and when they purported to cancel the contract they committed a breach of contract for which they became liable in damages to the appellants.

It was strongly submitted by Mr. Harvey that the submissions made by the appellants in the courts below did not include any submission covering the construction referred to above. While this appears to be the case, their Lordships cannot regard themselves as being restricted or circumscribed in regard to a question as to the proper construction of the clause in question. There would have been more force in the objection if a new point not taken below was one which could have been met by further evidence, e.g. if there had been no shipment and if it were alleged that the sellers had not taken all the steps which were reasonably open to them to procure the shipment. Inasmuch, however, as the respondents by shipping 50 tons had themselves shown that they were able to ship 50 tons, no new issue of fact was involved. Their Lordships are clearly of the opinion that the respondents cannot be

allowed to excuse their non-performance by reference to their other commitments or to seek to give those other commitments priority over the appellants' claim. The contract of 7th November contains no reference to other contracts or to other commitments. Such other commitments were of no concern to the appellants. The contract was simply a contract for the sale by the respondents of cloves of the quantity and description set out in the contract and the respondents failed to fulfil their obligations to the appellants.

Apart from these considerations their Lordships find it difficult to see how it can be said that the 50 tons were "shipped in fulfilment of other contracts". If it is asked: "Which contract or contracts?", no satisfactory answer can be given and none was given. The respondents urged that the words "subject to shipment" meant "subject to our in fact shipping enough to satisfy our commitments" or "subject to our shipping enough to satisfy all contracts that we will have made up to the date of arrival of the last ship of December shipments". In their Lordships' view it would be quite unreasonable and would be an unwarranted straining of interpretation to place any such meaning upon the words now being examined. To arrive at any such interpretation a drastic series of additions to the words used would be necessary.

It is further to be observed that there are no additional words of limitation such as "subject to shipment of 50 tons which we, at the time of shipping, appropriate to you". Doubtless no such words were used for the reason that in view of the nature of the respondents' business and operations there would be no question of their appropriating or earmarking any particular cloves to any particular contract at the time of shipment. The respondents were importers and stockists and their necessity was to secure that they arranged for sufficient goods to be shipped to themselves in Singapore, so that they could then meet all their obligations in Singapore. It is manifest that the respondents did not ship the quantities that they needed. But when they shipped they were merely shipping goods to themselves as merchants and importers and so far as they are concerned they had not arranged the particular ways in which they would deal with the cloves after the cloves had arrived in Singapore. The evidence shows that there was no allocation or attribution to any particular client of theirs. According to the evidence, what the respondents did was to go to their solicitors to take advice as to what they should do by way of allocating the tonnage available for them having regard to the arrangements that they had made. But those arrangements were no concern of the appellants and there was no stipulation in the contract in regard to any other contracts.

For the reasons stated their Lordships consider that on the undisputed facts the respondents were without excuse when they failed to deliver to the appellants. On this basis there was agreement between the parties during the hearing before their Lordships' Board that the correct measure of the appellants' damages was the difference between the contract price and the market price at or about the date when the s.s. Ettrick Bank arrived in Singapore. The difference between the parties was as to whether the amount of such damages could be ascertained and had been satisfactorily proved by the available evidence. It had been stated in the Court of Appeal that if an order were made directing the learned trial judge to reopen the proceedings and to assess the damages payable, no evidence could, after the intervening lapse of time, be called to establish what was the market price of cloves in January, 1951.

The problem was therefore one of proof. In the Court of Appeal, Knight Ag, C.J. held that the evidence was sufficient to establish that the appellants were entitled to recover the sum of $46,783.80 damages. Wee Chong Jin, J. concurred in this view. The reasoning of Knight Ag, C.J. was that evidence as to the market price at the relevant time could sufficiently and satisfactorily be found in the facts and circumstances relating to the settlements effected by the appellants with Messrs. Makhanlall & Co. and with Messrs. Panachand & Co. The contract price between the appellants and these firms was $99 per picul. The sum paid after a negotiated settlement with Messrs. Makhanlall was $28,000.

The respondents took a part in negotiating and bringing about that settlement. It seems a reasonable inference as a matter of business commonsense that the sum of $28,000 would certainly not be more than but would probably be less than the sum resulting from taking the contract price of $99 and the market price at the date when Messrs. Makhanlall should have received their cloves. In their Lordships' view this is very reasonable. But by way of answer to or criticism of this it was pointed out that the settlement made with Messrs. Panachand & Co. only involved a payment of $15,000. Both settlements, which incidentally were effected within a few days of each other in August, 1951, related to contracts for the same quantities and having the same figures of purchase price and the same times of delivery. It could not therefore be that both figures, since they differed, were direct calculations based upon the market price. This criticism does not, however, diminish the force of the inference that no settlement would have been negotiated, particularly by the respondents, on the basis of paying more than the difference between the contract price and the current or market price at the time of non-delivery. It was common ground that there was at all material times an available market for cloves in Singapore.

It was said that though Mr. Jumabhoy had himself been under the necessity to make local purchases in Singapore in an endeavour to meet his obligations yet he was not asked questions as to the prices he had had to pay. Though it was agreed that the evidence showed that at the relevant time the price of cloves was rising, it was submitted that the evidence was not adequate to enable the court to arrive at a conclusion as to what was the market price. Though there is some force in the contentions advanced, their Lordships consider, in agreement with the majority of the Court of Appeal, that it was a reasonable inference that the difference between the contract price of $94½ per picul for the appellants' 50 tons and the market price at the time when there should have been delivery was not less than $46,783.80.

For the reasons stated their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgments of the Courts below be set aside and judgment entered for the appellants for the sum of $46,783.80.

The respondents must pay the costs of the appeal and the costs in the Courts below.

(39112) Wt. 8078—37 100 4/60 D.L.

In the Privy Council

HONG GUAN & COMPANY LIMITED

v.

R. JUMABHOY & SONS LIMITED

DELIVERED BY
LORD MORRIS OF BORTH-Y-GEST

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1960