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1967/4

IN THE PRIVY COUNCIL No. 37 of 1965

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
15 MAR 1968
25 RUSSELL SQUARE
LONDON, W.C.1

ON APPEAL

FROM THE BRITISH CARRIBEAN COURT OF APPEAL

BETWEEN:

1. R. P. DOOBAY
2. N. P. DOOBAY and
3. JAISRI RAM, jointly and severally — Appellants

- and -

MOHABEER — Respondent

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CASE FOR THE APPELLANTS

Record

1. This is an appeal from a Judgment and Order of the British Carribean Court of Appeal dated 5th April 1965 whereby a Judgment and Order of the Supreme Court of British Guiana dated the 5th May 1964 were varied. The learned trial Judge had given Judgment for the Respondent (hereinafter called the Plaintiff) on his claim for $9500 with costs, and for the Appellants (hereinafter called the Defendants) on their counterclaim for $3500 with costs. The Court of Appeal upheld the Judgment on the claim and reduced the award on the counterclaim to $240 with no order for costs of the appeal on the counterclaim. (p.34 - p.36; p.37; p.20 - p.29; p.29)

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2. The Plaintiff's claim was for $9500, the alleged "balance" said to be due under a hire purchase agreement in respect of a rice milling machine (hereinafter referred to as a "mill", or "rice mill"). The Defendants did not claim to have paid the monies claimed, but they alleged that the Plaintiff was in breach of the agreement in that the mill never worked, or never worked satisfactorily, and they relied upon the alleged breach (or breaches) by way of defence and in support of a set-off and counterclaim for damages. The alleged breach or breaches was or were in due course proved. (p.2 l.16; p.7 l.14; p.7 l.21)

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3. The principal questions that arise for determination on this appeal are:-

Record

(i) Whether the Plaintiff's breach or breaches was or were fundamental, going to the root of the agreement, and (if so) whether that provides an effective defence to the claim for the alleged balance of monies due; and -

(ii) What is the true measure of the damages to which the Defendants are entitled, and what is the amount recoverable by them as damages? 10

B p.41 - p.46

4. The hire purchase agreement is dated the 27th September 1961. It stated the "selling price" of the mill to be $14,500 and provided for a down payment of $3,000, the "balance" to be payable as follows:-

p.42 l.2
p.42 l.7

p.42 l.11

$2000 on November 25th 1961,
$2000 on April 16th 1962,
$7500 on November 1962.

p.45

The agreement provided that the Defendants as hirer might at any time during the hire become the purchaser of the mill by payment in cash of the price of $14,500 plus any accrued interest, credit being given for payments previously made under the agreement. 20

5. The agreement included the following clause:-

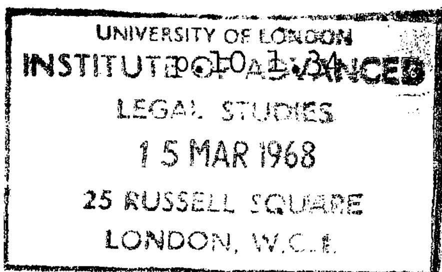
p.44 l.46

"11. That the ITEM(S) (i.e. the mill) shall not be pledged, pawned, or otherwise dealt with but shall be, and continue to be the sole property of the Owners (i.e. the Plaintiff), and that the Hirer (i.e. the Defendants) shall remain and be considered a Bailee only thereof for all purposes both civil and criminal." 30

p.2

6. The Plaintiff by his Statement of Claim dated the 7th December 1962, as amended on the 4th February 1964, alleged the agreement of the 27th September 1961 and that the Defendants had paid only the first down payment of $3000 and one instalment of $2000, and claimed the alleged balance due of $9500. The agreement was pleaded as an agreement of sale, alternatively of hire purchase. 40

p.9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7. The Defendants, by their Defence, admitted the agreement as a hire purchase agreement and alleged the breach or breaches referred to above in paragraph 2 hereof. By way of Set-off and Counterclaim they repeated their allegations of breach of contract, and claimed damages as follows:- p.6 l.40 p.7 l.20

(1) $9,800.00 (nine thousand eight hundred dollars) as damages for the breach of the said agreement, in the alternative.

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(2) Special damages.

(a) $5,000.00 (five thousand dollars) paid as advance for the said Rice Mill.

(b) $1,500.00 (one thousand five hundred dollars) for installation of same.

(c) $3,300.00 (three thousand three hundred dollars) for a 62 H.P. Lister Engine to propel the said (mill).

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8. The hearing before the Supreme Court was on the 2nd April 1964. The Plaintiff by Counsel submitted that on the pleadings it was for the Defendants to begin and the learned trial Judge (Crane, J.) upheld that submission. p.12 l.8 p.12 l.30

9. The evidence adduced on behalf of the Defendants included the following:-

The First-named Defendant

Examination in chief

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I live at Kingston, Leguan, Essequibo. I am the first-named Defendant. I am a rice farmer and rice miller p.12 l.40

I know the Plaintiff Mohabeer. In 1961 I and one Angus went to Wakenaam to the rice mill of the Plaintiff. We went there to see how his rice mill was working but when we went there the mill was not working. Mohabeer told us to buy his mill, that two experts would be coming from Japan to examine it and put p.13 l.1

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it in good working order. Mohabeer offered his mill to us for $14,500 and we agreed to buy. We bought because Mohabeer told us that two experts would be coming to put it in order. This was in September 1961 and the same time we paid him $,3000.00. The agreement between Mohabeer and I was that the $3,000 would be paid as down payment and the balance by instalment 10

p.13 l.27

The Plaintiff sent Angus Whyte to install the rice mill. Another man called Neville was sent too.

The mill was installed on concrete foundations at our factory at Doorn-haag. The cost of the installation was $1,500 including workmanship. We had to buy a Lister Engine from Sprostons Limited to propel the mill. The Lister Engine costs $3,519.95. 20 This is a certified bill (put in by consent of parties - Exhibit A.) A few months later after September 1961 I paid the Plaintiff $2,000. Before this in the Leguan-Parika ferry boat I spoke with the Plaintiff in presence of one Secomar Jagroop. The Plaintiff then told me it was time to pay $2000 on the mill. I told him we could not get the mill to work. The Plaintiff 30 then said: "Don't be afraid boy the experts are coming to repair the mill." ....

A. p.41

p.14 l.4

The experts never came. I ordered a pulley from the Demerara Foundry for $137 to get the mill to work but it would not. I have not paid Plaintiff any more money. I have tried to get the mill to work but cannot. Neville came to try to get it to work but he could not........

p.14 l.20

I admit that I entered into a contract 40 with the Plaintiff to buy this rice mill and paid him $5,000. I even offered to return his rice mill and for him to keep the $5,000. but he refused. I told plaintiff this before I got this Writ in this case but Plaintiff said he did not want back his mill.

I claim Plaintiff is in breach of contract of warranty of contract. I claim $9,800 including $1,500 for installing mill; $3,300 for the Lister Engine to propel the mill and the return of my advances. The rice mill never worked. I now say the rice mill worked but broke up the rice. I put in 50 bags padi to be milled into rice for Secoomar Jagroop but all broke
10 up. 30 bags for Birjanie and all broke up. I had to pay those men for their padi $8 per bag.

Cross-examination

I say plaintiff sent one Angus Whyte to operate the mill. I say the mill is bad because Angus Whyte failed to operate . . . . — p.15 1.1

I took plaintiff's word that the experts were coming. Mohabeer told me he knew
20 nothing about the mill but experts would be coming to repair the mill and I believed him. I took him at his words that experts would be coming to British Guiana. . . . . — p.15 1.26

It is not true that I was satisfied with the way the mill worked and that is why I bought it. I bought the mill because he told me that experts were coming. — p.15 1.49
The plaintiff said he would supply parts.
30 I took his word. . . . . — p.16 1.1

Angus William Whyte

Examination in Chief:

I live at Canefield, Leguan. I am a rice miller and landed proprietor . . . . — p.16 1.29

In September, 1961, I accompanied Resaul Persaud Doobay to Plaintiff's factory at Melville, Wakenaam to inspect a multi-stage rice mill. Mr. Mohabeer gave us a demonstration of the mill but part of the
40 mill was not working. The padi separator was not working. The demonstration was not satisfactory. — p.16 1.34

Resaul agreed to buy the mill and plaintiff agreed to put the mill in working order. I was present. I did not hear the price the parties bargained for because I had to — p.17 1.1

Record

leave.

The plaintiff said he would put the mill in working order for the defendant. I promised to install the mill on the defendant's premises. . . . .

p.17 l.15 — .....When we assembled the rice mill at the defendant's factory we could not get it (the mill) to work. One day shortly after the installation of the mill I spoke to plaintiff in presence of second defendant. This was aboard the ferry boat. Mohabeer told me that he expected to get two experts from Japan to look after the mill. 10

p.17 l.31 — I say the mill never worked when we installed it at the defendant's factory. It never worked. We could not get the separation system to work at all. I could not say where Mohabeer got the mill from.

Cross-examination 20

p.17 l.37 — We started up the mill at Mohabeer's place. It worked, but not satisfactorily.

. . . .

p.17 l.45 — The mill's engine turned over at Mohabeer's yard. It also turned over at defendant's factory.

Re-examination

p.18 l.23 — Further than that plaintiff undertook verbally to see that the mill was put in working order, I do not know anything more. 30

Birjune Algoo

Examination-in-Chief:

p.18 l.28 — I live at Richmond Hill, Lequan. I am a rice farmer. I mill my rice at first defendant's factory.

In 1961/1962 I milled my padi there. I took 60 bags padi there to be milled into rice but the padi broke up. The first defendant had to pay me for 30 bags at $8 per bag. Thirty bags of padi were damaged. I got no white rice. This was broken. 40

Record

10. The Plaintiff adduced no evidence in support of his case. By his counsel, he stated that he chiefly relied upon a Receipt, dated 27th September, 1961, for the down payment of $3,000, signed by the Plaintiff, and also by the Defendants, which stated that the mill was "sold and delivered as is" (Exhibit D). — p.19 l.6; p.46 D; p.47 l.5 D

11. The Judgment of the Supreme Court was delivered on the 5th May 1964. The learned trial Judge held that the agreement was one of hire, with an option to purchase, but without any obligation to purchase, that the provisions of the Sale of Goods Ordinance therefore did not apply to the transaction, and that it was a transaction of bailment. — p.20 - p.29; p.21 l.31

12. The learned Judge found that the rice mill was defective and that the Plaintiff had made a verbal representation that the defects would be set right on the arrival of experts. He held that this was no mere representation but a substantive part of the contract and induced the making of it. He further held that the Plaintiff was bound by an implied obligation upon him as bailor to ensure that the mill was reasonably fit for the purpose for which it was hired. — p.22 l.44; p.24 l.19; p.22 l.39; p.24 l.23; p.25 l.16

On the question of breach, the learned trial Judge held that the Plaintiff was in breach of the implied obligation; and it would seem from the Judgment that he also took the view that the Plaintiff was in breach of the "substantive part" of the contract, arising from his own representations, although this is not stated in express terms. — p.27 l.17

13. The learned Judge then went on to consider the relief to which in his view the parties were respectively entitled. He expressed the opinion that the Plaintiff's breach was of such a kind (described by the learned Judge as an "essential breach") as to have entitled the Defendants to treat the agreement as repudiated and bring it to an end. This appears to be a finding that the Plaintiff's breach, or breaches, was or were fundamental, going to the root of the agreement, and it is submitted — p.27 l.21

Record

that, on the evidence, that is right.
p.27 l.39 He held, however, that the Defendants "by their inertia" had elected to affirm the contract, and were therefore liable to pay the monies claimed by the Plaintiff. It is submitted that the learned Judge was wrong in so holding, and that by reason of the Plaintiff's breach, or breaches, and the fundamental nature thereof, the Defendants have a good defence to the claim. 10

14. When considering the question of the quantum of damages to which the Defendants are entitled the learned trial Judge began p.28 l.6 by eliminating from his consideration the claim for $5,000 paid by them under the hire purchase agreement. He based his view upon Clause 8 of the agreement which reads as follows:-

B p.44 l.25 "8. That when the hiring is terminated the Hirer shall not on any ground whatsoever be entitled to any allowance, credit, return, or set off for payments previously made." 20

It is submitted that the said clause has no bearing upon the Defendants' claim for damages and that the learned Judge erred in rejecting the counterclaim insofar as it relates to the said item of $5000.

15. With regard to the claims for $1500 as installation expenses and $3500 the price of the Lister engine to operate the mill, the 30 p.28 learned Judge took the view that, although both claims had been supported by evidence, and the amounts had not been effectively challenged, only one of these sums is recoverable as special damages and he allowed the claim for $3500. He stated as follows:-

p.28 l.31 "I shall allow the claim for $3500 only on the rule in Hadley v. Baxendale (1852) 9 Exch. 341, but not $1,500 which 40 I consider has not been properly established, though I can imagine defendants did entail some expense, in installing the mill."

It is submitted that by the evidence of the

Record

first named Defendant the said expense of $1,500 for installation of the machine was duly proved, and that that sum ought to have been included in the damages awarded. — p.13 l.33

16. The learned judge declined to allow the sum of $640 paid by the Defendants to their customers for damaged rice for 2 reasons, viz: that it was not pleaded and that the Defendants could have avoided the damage by "appropriate steps taken after the time they knew of the defects". The Defendants submit that the second of the said reasons is without foundation in the evidence. As for the pleading point, the evidence relating to this part of the damage suffered by the Defendants was adduced without any objection on the part of the Plaintiff. — p.28 l.38; p.28 l.5; p.28 l.53

17. It is further submitted that if the learned trial Judge was right in holding that the Defendants were liable to pay to the Plaintiff the sum of $9,500 on the claim, then that sum is recoverable by the Defendants as damages on their counterclaim. — p.27 l.47

18. The Plaintiff appealed against that part of the judgment of the Supreme Court whereby damages were awarded to the Defendants on their counterclaim. The Defendants also appealed, contending that the judgment in favour of the Plaintiff on the claim should be reversed and that the judgment in favour of the Defendants on their counterclaim should be varied by increasing the amount of damages awarded from $3,500 to $10,019.95. — p.31; p.32; p.32 l.29; p.32 l.37

19. The judgment of the Court of Appeal (Archer, P., Jackson J.A., and Luckhoo, C.J. British Guiana) affirmed the judgment of the Supreme Court on the claim with costs. Their Lordships stated, <u>inter alia</u>, — p.34 - p.36

> "they (i.e. the Defendants) did not repudiate the agreement, and at the trial they took the stand that they had purchased the mill and had elected to keep it." — p.36 l.1

It is respectfully submitted that that view of

the position taken up by the Defendants at the trial is erroneous, and that there is no evidence to support the view that the Defendants made any "election".

20. With regard to the Defendants' claim for damages, the judgment of the Court of Appeal dealt with the item of $5,000 in the following terms:-

p.36 l.6

> "The Respondents (i.e. the Defendants) continued under the agreement up to the time of the trial and are therefore liable for the unpaid instalments. They would have been entitled to a refund of the $5,000 they paid if there had been a fundamental breach of the agreement, but there was not a total failure of consideration. The mill, although faulty, functioned as a mill and was not something different from the subject-matter of the agreement."

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It is respectfully submitted that the Court of Appeal were wrong in suggesting that the Plaintiff's breach or breaches of the agreement was, or were, not fundamental, and in saying that there was not a total failure of consideration. The evidence shows (it is submitted) that the mill never "functioned as a mill". On the contrary as a mill it was of no use or value to the Defendants and on the evidence it appears that its only functioning was so faulty that it resulted in the Defendants having to pay $640 for broken padi.

p.14 l.4
p.14 l.34
p.14 p.35

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21. The Court of Appeal dealt with the items arising from the cost of installation, and the purchase of a Lister engine in the following terms:-

p.36 l.19

> "The installation of the mill and the provision of an engine are, however, the responsibility of the respondents, and they cannot recover in respect of those items."

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It is respectfully submitted that the view expressed in that passage is erroneous and that both are items of damage which flow from the

Plaintiff's breach or breaches of contract.

22. The Court of Appeal allowed as damages to the Defendants the sum of $240 which had been paid to a customer for broken padi, notwithstanding that the item was not pleaded. It is respectfully submitted that on the evidence the correct amount under this head is $640.

p.36 l.30

p.14 l.30

23. The judgment of the Court of Appeal contained the following passage:-

10 "They (i.e. the Defendants) did not claim for the cost of putting the mill in good working order, the mill they now find themselves saddled with, and the only item of damage by way of loss of custom proved - and even this was not pleaded - was the refund of $240 to a customer for broken paddi."

p.36 l.24

The Defendants submit that no question of their claim being considered upon the basis of the
20 cost of putting the mill in good working order arises upon the pleadings or the evidence. There is no evidence that it could have been put into working order, and the Plaintiff never sought to suggest that anything could or ought to have been done by the Defendants to put it into working order and thereby reduce the quantum of damages to which they were entitled.

24. The Court of Appeal concluded that part of their judgment which dealt with the counterclaim
30 for damages with the following passage:-

"The amount they (i.e. the Defendants) can recover on the counterclaim is therefore, by reason of the uninspired pleading and conduct of their case, probably much less than the loss they have actually suffered, but the fault is entirely their own."

p.36 l.31

It is respectfully submitted that the relevant facts are sufficiently stated in the Defence and
40 Counterclaim and that in view of the way in which the case was conducted by both parties and the evidence that was adduced, it was open to the Court of Appeal, upon the basis of that evidence, to apply in full the principle of <u>restitutio in</u>

integrum, and that they ought to have done so. It is further submitted that it is unjust, and wrong in law, that the sum awarded to the Defendants by way of damages should be substantially less than the amount to which, on the evidence, they are entitled.

25. No consideration was given by the Court of Appeal to the question whether the sum of $9800 (which they held to be recoverable on the claim) is on the other hand recoverable by the Defendants as damages. 10

p.37

26. The Defendants therefore submit that the judgment and order of the British Carribean Court of Appeal dated the 5th April, 1965, should be set aside or varied, and that judgment should be entered for the Defendants on the claim and on their counterclaim and that they should be allowed their costs of this appeal and in the courts below, for the following, amongst other, 20

R E A S O N S

(1) BECAUSE the Plaintiff was in breach of the Agreement dated the 27th September 1961 as found by the Supreme Court.

(2) BECAUSE the Plaintiff was in breach both of the implied obligation resting upon him as a bailor, and of the express term of the agreement, as found, based upon his own representations. 30

(3) BECAUSE the Plaintiff's breach or breaches was or were fundamental, going to the root of the agreement, and the Supreme Court was right in so holding.

(4) BECAUSE by reason of the said breach or breaches there was a total failure of consideration and the Court of Appeal were wrong in holding to the contrary. 40

(5) BECAUSE the rice mill was not reasonably fit for its purpose and was useless and of no value to the Defendants.

(6) BECAUSE, on the evidence the Court of Appeal were wrong in holding that the rice mill "functioned as a mill".

(7) BECAUSE there was no evidence that the mill was of any value.

(8) BECAUSE by reason of the Plaintiff's breach or breaches of the agreement, and the fundamental nature thereof, he is not entitled to recover the alleged
10 "balance" of monies, the subject of his claim herein.

(9) BECAUSE both Courts below were wrong in holding that there had been an "election" on the part of the Defendants; and the evidence does not support a finding either that they had elected to affirm the contract (as found by the learned trial judge) or that they had purchased the mill and elected to keep it (as
20 found by the Court of Appeal.)

(10) BECAUSE a proper inference to be drawn from the evidence is that the Defendants declined to make any further payments under the agreement, after that of April, 1962, by reason of the Plaintiff's breach or breaches of the agreement, which amounted to a repudiation by him of the agreement, and that they made known to the Plaintiff both the fact that they so
30 declined, and their reason.

(11) BECAUSE the Defendants never exercised their option to purchase the mill.

(12) BECAUSE if the Courts below are (contrary to the Defendants' contention) right in holding that the Plaintiff is entitled to recover the monies the subject of his claim herein, then an amount equal thereto is recoverable by the Defendants as damages.

(13) BECAUSE the Defendants are entitled to
40 set off damages recoverable by them against the sum (if any) recoverable by the Plaintiff against them.

(14) BECAUSE the Defendants are entitled to

recover by way of damages an amount equal to all the monies paid and payable by them under the agreement, and the monies paid by them for the cost of installation of the mill and the purchase of a Lister engine, and the monies paid by them to their customers for damaged padi, on the principle of restitutio in integrum.

(15) BECAUSE the amount recoverable as damages by the Defendants in respect of monies paid by them for damaged padi is, on the evidence, $640, and not $240 as found by the Court of Appeal. 10

(16) BECUASE the Supreme Court was wrong in holding that Clause 8 of the agreement dated the 27th September 1961 constituted a bar to the Plaintiff's claim for damages, in respect of the item of $5,000. 20

(17) BECAUSE it was not contended by the Plaintiff that the Defendants could or ought to have done anything to put the mill in good working order, and there was no evidence that they could or ought to have done so.

(18) BECAUSE the Court of Appeal erred in awarding to the Defendants by way of damages a sum which is less than that to which, on the evidence, they are entitled. 30

(19) BECAUSE the agreement between the parties was one of hire-purchase, not sale.

RALPH MILNER

KEITH Mc.HALE

No. 37 of 1965

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- and -

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