43 Phil. 823

[G. R. No. 19009. September 26, 1922]

E. C. MCCULLOUGH & CO., PLAINTIFF AND APPELLEE, VS. S. M. BERGER, DEFENDANT AND APPELLANT.

D E C I S I O N

STATEMENT

For cause of action it is alleged that in the month of February, 1918, plaintiff and defendant entered into an agreement by which the defendant was to deliver plaintiff 501 bales of tobacco at New York City in good condition, That delivery was made and the plaintiff paid the full purchase price. That upon an examination later the tobacco was found to be in a musty condition, and its value was $12,000 less than it would have been if the tobacco had been in the condition which defendant agreed that it should be, as a result of which plaintiff claims damages for $12,000, United States currency, or P24,000, Philippine currency. That when the condition of the tobacco was discovered, plaintiff promptly notified the defendant, who ignored the protest. Wherefore, the plaintiff prays judgment for the amount of P24,000, Philippine currency, for costs and general relief.

For answer, the defendant denies all the material allegations of the complaint, and, as a further and separate defense, alleges that on August 15, 1918, he was advised by the plaintiff that the latter was dissatisfied with the quality of the tobacco, and he made him a formal written offer to repurchase the tobacco at the original selling price with accrued interest, and that plaintiff rejected the offer.

That defendant has been ready and willing at all reasonable times to accept the return of the tobacco and to return the amount of the purchase price with legal interest, and has repeatedly tendered to the plaintiff such purchase price in exchange for the return of the tobacco, and that plaintiff had refused to return it. That any damages which plaintiff may have suffered have been wholly due to his willful refusal to return and redeliver the tobacco.

Upon such issues there was a stipulation of facts, and after trial the lower court rendered judgment against the defendant and in favor of the plaintiff for the sum of $11,867.98 or P23,735.96 with legal interest from January 6, 1920, and costs, from which, after his motion for a new trial was overruled, the defendant appeals, claiming that the court erred: First, in finding that the tobacco was not in good condition when it arrived in New York; second, in holding that the plaintiff is entitled to maintain an action for breach of contract after having agreed with the defendant to rescind and to make restitution of the subject-matter and the price after a violation of the agreement; third, in holding that the plaintiff, having elected to rescind and notified the defendant of such an election, may now refuse it and affirm the same and recover from the alleged breach of warranty; fourth, in holding that this action should be maintained, no claim having been made for the alleged breach of warranty of quality within the statutory period; and, fifth, in overruling the defendant's motion for a new trial.

Johns, J.:

In February, 1918, the defendant met the plaintiff in the city of Manila and advised him that he had made a shipment of 501 bales of tobacco to New York City consigned to S. Lowenthal & Sons, who had refused to honor the draft which was drawn upon them. He asked the plaintiff whether he could use the tobacco provided it was "perfectly sound." At the plaintiff's request the defendant made and signed a writing as follows:

> "Referring to the shipment of 501 bales of tobacco sold you consisting of 188 200-pound bales of scrap and 313 200-pound bales of booked tobacco, I beg to confirm my verbal conversation with you in stating that I guarantee the arrival of the tobacco in New York in good condition, subject, of course, to conditions arising after its departure from Manila, which contingencies are covered by adequate insurance." (Stipulation par. 1.)

Upon the strength of this the plaintiff cabled his New York office to honor the defendant's draft, which was ninety days' sight for $33,109, and was the same draft and amount which had been refused by S. Lowenthal & Sons. The draft was honored by his New York office at plaintiff's request. The shipment consisted of 188 bales of "scrap," invoiced at 28 cents, gold, per pound, and 313 bales of "stripped" and "booked" at 36 cents, gold, per pound, and was made c. i. f. New York. Before its arrival in New York the plaintiff had found purchasers for a large portion of it with whom he had made contracts for sale subject to examination as

to condition. The tobacco arrived in two shipments. The first of 213 bales on April 26, and the second of 288 bales on May 18, 1918, and it was at once placed in warehouses by plaintiff. With the exception of four or five bales, it appeared from an examination that the tobacco was well baled, and to all outward appearances was in good condition after the shipment. After it was placed in the warehouse, the tobacco itself was examined as to its condition and quality by the different buyers to whom the plaintiff had contracted to sell it, and after such physical inspection, they refused to accept it and complete their purchase because it was "musty." It appears that the plaintiff had sold 188 bales of the tobacco before its arrival in New York to a customer in Red Lion, Pennsylvania, to whom he shipped 75 bales of it after its arrival. This customer refused to receive any of the remaining bales which he had purchased, and the plaintiff was compelled to again reship it back to New York. Complying with his agreement, on May 21, 1918, the plaintiff paid the defendant's draft which he had previously accepted, thus completing his part of the contract with the defendant.

On May 23, 1918, and as a result of physical inspection, the plaintiff cabled the defendant that the tobacco was unsatisfactory, and on June 13, he again cabled that there would likely be a loss. On June 28, 1918, the plaintiff wrote a letter to the defendant in which, among other things, he says:

> " * * * The tobacco has a very strong ground smell and somewhat of a musty smell as though it had been mixed up with musty tobacco. In other words, it appears like this is tobacco assorted from bales which were mildewed and this is that part of the bale which was not mildewed. It does not seem possible that this odor, or musty smell, could have developed in transit as it seems perfectly clear that the tobacco was packed in that same condition. In all the bales which we have examined, which have been considerable, the tobacco seems to be perfectly dry. In view of that I can see nothing but every indication that the tobacco was originally a bad lot."

In this letter he also advised the defendant that he was doing everything he could to sell the tobacco, and that he did not have any prospective buyer eyen at a loss of 25 per cent.

August 9, 1918, the defendant acknowledged the receipt of the letter and cables, saying that he was "not in a position to lose between seventeen and twenty thousand pesos, and that he would consent to a reduction of four thousand pesos, if that was acceptable, and, if it was

not, to have the bank pay back the amount of the draft with interest and take charge of the tobacco until the defendant would arrive in New York." The plaintiff did not receive this cable until August 21, when he cabled in reply that he would turn the tobacco over to the defendant, and that he "awaited telegraphic instruction in regard to it. That at least twenty dealers had passed on the tobacco." At that time the plaintiff had sold 66 bales of scattered samples from which? with the 75 bales sold to the Red Lion customer, he realized $9,031.71.

September 5, 1918, the defendant wrote the New York Agency of the Philippine National Bank in which he said that the plaintiff had advised him that the tobacco on arrival was not satisfactory, and that there would be a loss, and that he had assured its arrival at destination "in good condition." That he was taking it back. That the bank should pay plaintiff $33,109 plus interest upon delivery to it of the 501 bales. That "on no account should they agree to accept any shortage in the number of bales."

October 18, 1918, without any knowledge of the defendant's instruction to the bank, the plaintiff wrote him that his proposition to take the tobacco back was satisfactory in which he said that he had not heard from the bank "at the time of writing with reference to taking back of the tobacco." October 30, 1918, the bank wrote the plaintiff that it would take back the identical 501 bales, and pay him the amount of the draft and interest. The plaintiff then wrote the bank a complete history of the transaction, and explained why the identical 501 bales could not be returned. That he had realized $9,031.71 from 141 bales of it which he had sold, for which he would account and return the balance of the tobacco which was then unsold and in the New York warehouse. The $9,031.71 was more than the actual agreed purchase price of the 141 bales. This offer was cabled to the defendant, who replied:

> "The instructions given you in my letter dated September 5, 1918, will not be modified."

The bank notified the plaintiff of the receipt of this cable, and in turn notified the defendant that the plaintiff would sell the tobacco at public auction, and then sue him for the balance of the purchase price, and later the plaintiff did sell the remainder of the tobacco upon which there was a net actual loss to him of $11,867.98, over and above all actual charges and expenses.

Although at the time of the making of the contract between them: the plaintiff and

defendant were in Manila, the tobacco involved was on the high seas in transit to New York. From necessity the plaintiff could not see or examine it and would not know anything about its grade or- quality, and, for that reason, insisted that the defendant should make and sign the writing above quoted in which he says:

> "I guarantee the arrival of the tobacco in New York in good condition, subject, of course, to conditions arising after its departure from Manila, which contingencies are covered by adequate insurance."

The trial court found and the testimony is conclusive that the tobacco did not arrive in New York "in good condition," and that, as a matter of fact, it was not "in good condition" when it left Manila.

The plaintiff and defendant had known each other for about ten years, and had mutual confidence in each other, and were experienced business men.

Defendant's draft of the tobacco had been dishonored. Plaintiff was walling to take the tobacco and honor the draft, with the proviso that the defendant would guarantee its arrival "in good condition."

The evidence shows that in the whole transaction, the plaintiff acted in good faith and made an earnest effort to protect the defendant and minimized his loss. Defendant knew that in the very nature of things the plaintiff bought the tobacco for the purpose of resale, and that in the ordinary course of business, he would resell it. The record shows that he found purchasers for portions of it before its arrival in New York. The only reason why plaintiff's sales were not consummated was because the tobacco did not stand inspection and was not "in good condition" at the time of its arrival in New York. In other words, plaintiff bought and paid the defendant for tobacco which was not "in good condition," and bought it for the purpose of resale. In the very nature of things, the defendant knew that the plaintiff bought the tobacco for the purpose of resale, and he also knew that, if the tobacco was not "in good condition," it was not worth the amount of the purchase price which plaintiff paid.

The defense cites and relies upon articles 336 and 342 of the Code of Commerce which are as follows:

> "A purchaser who, at the time of receiving the merchandise, fully examines the

> same shall not have a right of action against the -vendor, alleging a defect in the quantity or quality of the merchandise.
>
> "A purchaser shall have a right of action against a vendor for defects in the quantity or quality of merchandise received in bales or packages, provided he brings his action within the four days following its receipt, and that the damage is not due to accident or to natural defect of the merchandise or to fraud.
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> "In such cases the purchaser may choose between the rescission of the contract or its fulfillment in accordance with what has been agreed upon, but always with the payment of the damages he may have suffered by reason of the defects or faults.
>
> "The vendor may avoid this claim by demanding when making the delivery that the merchandise be examined by the purchaser for his satisfaction with regard to the quantity and quality thereof."

Article 342:

> "A purchaser who has not made any claim based on the inherent defects in the article sold, within the thirty days following its delivery, shall lose all rights of action against the vendor for such defects."

Whatever may be the rule as to sales which are completed within the jurisdiction of the Philippine Islands, those sections do not, and were never intended to, apply to a case founded upon the facts shown in the record. Although it is true that the contract between the plaintiff and the defendant was made in Manila, yet at the time it was made the tobacco was on the high seas, and under the contract, it was to be delivered "in good condition" in the City of New York, in consideration of which the plaintiff agreed to pay the draft. That is to say, the transaction was not complete until after the arrival of the tobacco in New York "in good condition," and the payment of the draft. It must be conceded that if, for any reason, the tobacco did not arrive in New York, the defendant could not recover upon the draft from the plaintiff. Hence, it must follow that the delivery of the tobacco at New York was a condition precedent which devolved upon the defendant to perform without which he would not have a cause of action against the plaintiff.

It is true that the writing recites “the shipment of 501 bales of tobacco sold you.” Yet, the fact remains that it was necessary to deliver the tobacco in New York to complete the sale.

Contracts of this nature should be construed with reference to the surrounding conditions and the relative situation of the parties.

At the time this contract was made both parties were in Manila, the tobacco was in transit to New York, and the defendant knew that the plaintiff entered into the contract for the purpose of a resale. Soon after the contract was made, the plaintiff left Manila and went to New York where, relying upon his contract with the defendant, he found purchasers for the tobacco on the assumption that it was “in good condition.”

Although the word “sold” is used in the written contract, the transaction shows that the sale was not complete until the arrival of the goods in New York.

The case of Middleton vs. Ballingall (1 Cal., 446), is somewhat in point, in which the court says’:

> “I think that the fair construction to be put upon the contract is, that on the arrival of the ship containing the goods, the defendants should deliver them, and the plaintiffs should pay the contract price. And the authorities hold that the arrival of the goods, in such case, is a condition precedent, which must be shown to have taken place before either party can bring suit.”

In the instant case, the contract was at least executory as to the delivery of the tobacco in New York.

Cyc., vol. 35, pp. 274, 275 and 276, says:

> “In order to pass the title to goods as against the seller or those claiming under him there must be a valid existing and completed contract of sale. Under a completed contract of sale the property in the goods passes at once from the seller to the buyer, at the place where the contract becomes complete, and for this reason the agreement is frequently called an executed contract. The sale is, however, an executory contract, if the seller merely promises to transfer the property at some future day, or the agreement contemplates the performance of

> some act or condition necessary to complete the transfer. Under such a contract until the act is performed or the condition fulfilled which is necessary to convert the executory into an executed contract, no title passes to the buyer as against the seller or persons claiming under him. While certain terms and expressions standing alone import an executed or executory contract, they are by no means conclusive but must be construed with reference to other provisions of the contract and according to what appears to have been the real intention of the parties, and so a mere recital in the writing evidencing the contract that the article is 'sold' or that the buyer has 'purchased' it does not necessarily make the contract executed; while on the other hand a recital that the seller 'agrees to sell' is not conclusive that the title was not intended to pass immediately."

The trial court found and the evidence sustains the finding that the plaintiff acted in good faith. The contract was made in February, 1918; the draft was payable ninety days after date; the first shipment of 213 bales arrived on April 26, and the second of 288 bales on May 18; and the plaintiff paid the draft on May 21, 1918, and the transaction between the parties then became complete. On May 23, he cabled the defendant that the tobacco was unsatisfactory. On June 13, he cabled that there would be a loss. On June 28, he wrote the letter above quoted. September 5, the defendant wrote the New York Agency of the Philippine National Bank that he would take the tobacco back on condition that there was not any shortage in the number of bales. During all of this time, the defendant had the use of plaintiff's money. It is true that the defendant offered to take the tobacco back and refund the money, but this offer was not actually made to the plaintiff until October, and was upon the condition that the full amount of the 501 bales should be returned, which was an impossible condition for the plaintiff to perform. But the plaintiff did offer to account to the defendant for the tobacco which he had sold and to return all of the unsold tobacco which was then in his warehouse, and the defendant declined the offer. As a business man, he knew that the plaintiff had then purchased the tobacco for the purpose of a resale, and that the tobacco had arrived at New York about five months before the offer was made, and he also knew that the plaintiff was using every effort to sell it and convert it into money, and that he would sell the whole or any part of it if a purchaser could be found at a reasonable price. At the time the defendant's offer was communicated to the plaintiff by the bank the plaintiff in turn offered to account to the defendant for the entire proceeds of the 141 bales which he had already sold, and to deliver to him all of the unsold tobacco. This was all that the plaintiff could do under the existing conditions. The fact that the defendant did not accept this offer is strong evidence that he was seeking an undue advantage, and that his

offer to plaintiff was not made in good faith.

The second shipment arrived in New York on May 18, and the plaintiff could not be expected to take any final action until the last shipment arrived. On learning the true condition of the tobacco, the plaintiff cabled the defendant on May 23 that it was unsatisfactory, and again on June 13, that there would be a substantial loss, which was followed by the letter of June 28th above quoted.

The defects in the tobacco were inherent and could not be ascertained without opening the bales and making a physical examination. When this was done, the plaintiff promptly cabled the defendant that the tobacco was not satisfactory. In the very nature of things, the plaintiff could not then render the defendant a statement of the amount of his claim. By the terms of the contract, the defendant guaranteed the arrival of the tobacco in New York "in good condition."

Plaintiff's first cable sent ten days after the arrival of the tobacco advised the defendant that it was unsatisfactory, and the second, twenty-six days after its arrival, advised him that there would be a loss.

Appellant's attorneys have submitted a very able and adroit brief in which they severely criticize the evidence on the part of the plaintiff. Upon all of the material questions of fact, the trial court found for the plaintiff, and, in our opinion, the evidence sustains the findings.

It must be remembered that during all of these times there was about ten thousand miles of ocean between them.

The plaintiff had parted with his money and honored the draft, expecting to sell the tobacco and get his money back with a profit.

The testimony is conclusive that the plaintiff in good faith tried to sell the tobacco, and that he sold the 141 bales at the best obtainable price; that the only reason why he did not sell the remainder was because the tobacco was not "in good condition;" and that when he first knew that it was not "in good condition," he promptly cabled the defendant that it was unsatisfactory.

As we construe the record, after the tobacco was inspected, the plaintiff promptly advised the defendant that it was unsatisfactory, and that he would have to sustain a loss, and in good faith undertook to protect the defendant and to minimize the loss, and plaintiff's claim

is not barred by the provisions of either article 336 or 342 of the Code of Commerce.

The judgment is affirmed, with costs. So ordered.

Araullo, C. J., Johnson, Malcolm, Avanceña, Villamor, Ostrand, and *Romualdez, JJ.,* concur.

CONCURRING

STREET, *J.*,

I concur in the conclusion reached in this case and in accord with most that is said in the opinion. But in the view I take of the case, it ought not to be said that the sale was not complete until the arrival of the tobacco in New York.

In view of the express guaranty given by the defendant to the effect that the tobacco would arrive in good condition, barring certain contingencies, and it having been clearly proved that the tobacco was not in good condition upon arrival there, a right of action accrued to the plaintiff to be indemnified to the extent allowed, and this independently of article 342 of the Code of Commerce. But, even supposing—this provision to be applicable, claim was made within thirty days after complete delivery had been effected. The maneuvers, of the defendant relative to taking back the tobacco—on terms which he must have believed would be impossible of fulfilment—were a mere ruse to gain an advantage, in the impending legal controversy; and the contention that there was a rescission, or accepted offer of rescission, is untenable.

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