

ATKINS, KROLL & CO., INC., PETITIONER, VS. B. CUA HIAN TEK, RESPONDENT.

G. R. No. L-9871. January 31, 1958

Ponente: BENGZON, J.

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BENGZON, J.:

Review of a Court of Appeals' decision.

For its failure to deliver one thousand cartons of sardines, which it had sold to B. Cua Hian Tek, petitioner was sued, and after trial was ordered by the Manila court of first instance to pay damages, which on appeal was reduced by the Court of Appeals to P3,240.15 representing unrealized profits.

There was no such contract of sale, says petitioner, but only an option to buy, which was not enforceable for lack of consideration because in accordance with Art. 1479 of the New Civil Code "an accepted unilateral promise to buy or to sell a determinate thing for a price certain is binding upon the promisor if the promise is supported by a consideration distinct from the price."

Simple are the facts of this case: Dated September 13, 1951, petitioner sent to respondent a letter of the following tenor:

"Sir (s) /Madam:

We are pleased to make you herewith the following firm offer, subject to reply by September 23, 1951:

Quantity and Commodity:

400 Ctns. Luneta brand Sardines in Tomato Sauce 48/15-oz. Ovals at \$8.25 Ctn.

300 Ctns. Luneta brand Sardines Natural 48/15 oz. tails at \$6.25 Ctn.

300 Ctns. Luneta brand Sardines in Tomato Sauce 100/5-oz. tails at \$7.48 Ctn.

Price (s):

All prices are C and F Manila Consular Pees of \$6.00 to be added.

Shipment:

During September/October from US Ports.

Supplier:

Atkins, Kroll & Co., San Francisco, Cal. U.S.A. We are looking forward to receive your valued order and remain

Very truly yours,"

The court of first instance and the Court of Appeals^[1] found that B. Cua Hian Tek accepted the offer unconditionally and delivered his letter of acceptance Exh. B on September 21, 1951. However, due to shortage of catch of sardines by the packers in California, Atkins, Kroll & Co., Inc., failed to deliver the commodities it had offered for sale. There are other details to which reference shall not be made, as they touch the question whether the acceptance had been handed on time; and on that issue the Court of Appeals definitely found for plaintiff.

Anyway, in presenting its case before this Court petitioner does not dispute such timely acceptance. It merely raises the point that the acceptance only created an option, which, lacking consideration, had no obligatory force.

The offer Exh. A, petitioner argues, "was a promise to sell a determinate thing for a price certain. Upon its acceptance by respondent, the offer became an accepted unilateral promise to sell a determinate thing for a price certain. Inasmuch as there was no consideration to support the promise to sell distinct from the price, it follows that under Art. 1479 aforequoted, the promise is not binding on the petitioner even if it was accepted by respondent." (p. 12 brief of petitioner.)

The argument, manifestly assumes that only a unilateral promise arose when the offeree accepted. Such assumption is a mistake, because a bilateral contract to sell and to buy was created upon acceptance. So much so that B. Cua Hian Tek could be sued, had he backed out after accepting, by refusing to get the sardines and/or to pay for their price. Indeed, the word "option" is found neither in the offer nor in the acceptance. On the contrary Exh. B accepted "the firm offer for the sale" and adds, 'the undersigned buyer has immediately filed an application for import license * * *.' (Italics Ours.)

Petitioner, however, insists the offer was a mere offer of option, because the "firm offer" Exh. A was a continuing offer to sell until September 23, and "an option is nothing more than a continuing offer" for a specified time. In our opinion, an option implies more than that: it implies the legal obligation to keep the offer open for the time specified.[2] Yet the letter Exh. A did not by itself produce the legal obligation of keeping the offer open up to September 23. It could be withdrawn before acceptance, because it is admitted, there was no consideration for it.

"Art. 1324. When the offerer has allowed the offeree a certain period to accept, the offer may be withdrawn at any time before acceptance by communicating such withdrawal, except when the option is founded upon a consideration, as something paid or promised." (n) (New Civil Code.)

"Ordinarily an offer to buy or sell may be withdrawn or countermanded before acceptance, even though the offer provides that it will not be withdrawn or countermanded, or allows the offeree a certain time within which to accept it, unless such provision or agreement is supported by an independent consideration. * * * " (77 Corpus Juris Secundum p. 636.)

Furthermore, an option is unilateral: a promise to sell [3] at the price fixed whenever the offeree should decide to exercise his option within the specified time. After accepting the promise and before he exercises his option, the holder of the option is not bound to buy. He is free either to buy or not to buy later. In this case, however, upon accepting herein petitioner's offer a bilateral promise to sell and to buy ensued, and the respondent ipso facto assumed the obligations of a purchaser. He did not just get the right subsequently to buy or not to buy. It was not a mere option then; it was bilateral contract of sale.

Lastly, even supposing that Exh. A granted an option which is not binding for lack of consideration, the authorities hold that

"If the option is given without a consideration, it is a mere offer of a contract of sale, which is not binding until accepted. If, however, acceptance is made before a withdrawal, it constitutes a binding contract of sale, even though the option was not supported by a sufficient consideration. * * *." (77 Corpus Juris Secundum p. 652. See also 27 Ruling Case Law 339 and cases cited.)

"It can be taken for granted, as contended by the defendants, that the option contract was not valid for lack of consideration. But it was, at least, an offer to sell, which was accepted by letter, and of this acceptance the offerer had knowledge before said offer was withdrawn. The concurrence of both acts—the offer and the acceptance—could at all events have generated a contract, if none there was before (arts. 1254 and 1262 of the Civil Code)." (Zayco vs. Serra, 44 Phil. 331.)

One additional observation should be made before closing this opinion. The defense in the court of first instance rested on the proposition or propositions that the offer had not been accepted in due time, and/or that certain conditions precedent had not been fulfilled. This option-without-consideration idea was never mentioned in the answer. A change of theory in the appellate courts is not permitted.

"In order that a question may be raised on appeal, it is essential that it be within the issues made by the parties in their pleadings. Consequently, when a party deliberately adopts a certain theory, and the case is tried and decided upon that theory in the court below, he will not be permitted" to change his theory on appeal because, to permit him to do so, would be unfair to the adverse party." (Rules of Court by Moran mdash;1957 Ed. Vol. I p. 715 citing *Agoncillo vs. Javier*, 38 Phil. 424; *American Express Company vs. Natividad*, 46 Phil. 207; *San Agustin vs. Barrios*, 68 Phil. 475, 480; *Toribio vs. Dacasa*, 55 Phil. 461.)

We must therefore hold, as the lower courts have held that there was a contract of sale between the parties. And as no legal excuse has been proven, the seller's failure to comply therewith gave ground to an award for damages, which has been fixed by the Court of Appeals at P3,240.15—amount which petitioner does not dispute in this final instance.

Consequently, the decision under review should be, and it is hereby affirmed, with costs against petitioner.

Paras, C. J., Padilla, Montemayor, Reyes, A., Concepcion, Reyes, J. B. L., Endencia, and Felix, JJ., concur. Bautista Angelo, J., concurs in the result.

[1] p. 6 brief of petitioner.

[2] *Morase vs. Burleigh* 170 La. 270, 127 So. 624.

[3] Or to buy as the case may be.

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