

ONG JANG CHUAN, PLAINTIFF AND APPELLEE, VS. WISE & CO. (LTD.), DEFENDANT AND APPELLANT.

G.R. No. 10907. January 29, 1916

Ponente: TRENT, J.

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TRENT, J.:

An appeal from a judgment of the Court of First Instance of Manila condemning the defendant to pay the plaintiff the sum of P1,237.50, together with interest and costs, as damages for a breach of contract.

The contract which forms the basis of this action reads:

"Between Messrs. Wise & Co. (Ltd.), Manila, and Mr. Ong Jang Chuan, Manila.

"We, Wise & Co. (Ltd.), have sold to Mr. Ong Jang Chuan the following goods, on this 29th day of July, 1914: "One thousand (1,000) sacks of flour, 'Mano' brand, at the net price of P11.05 (eleven pesos and five centavos) per barrel, the expenses of transportation from the Binondo Canal to be borne by the purchaser, 500 sacks to be delivered in September and 500 in October, which we bind ourselves to deliver * * * for which we shall receive a commission of * * * per cent of the total amount. Payment of the goods mentioned shall be made within 30 days counted from the date of delivery, and interest at the rate of * * * per annum on any unpaid amount that may still be due after the * * * days mentioned."

The pertinent facts, as found by the trial court, are these:

"It has been established by a preponderance of evidence that the reason for the nonfulfilment, on the part of Wise & Co., of the contract made with the plaintiff, was that the 'Mano' brand of flour which the defendant bound itself to deliver during the months of September and October had to come from Australia, and at the time the contract was executed Wise & Co. did not have a sufficient stock of the said brand of flour; and that, as the government of Australia prohibited the exportation of flour, because of the scarcity of grain in that country, due to the war that had been declared between Great Britain, of which Australia is an integral part, and the German Empire, it was impossible for the importers to supply Wise & Co. with a sufficient quantity of flour to enable the latter, in turn, to serve its customers."

It is urged that the trial court erred (1) in holding that the contract above set forth was an agreement to sell and not a perfected sale, (2) in not finding that the noncompliance of the contract was due to a fortuitous event, and (3) in condemning the defendant to pay to the plaintiff the sum of P1,237.50.

In the argument, as appears in defendant's printed brief filed in this court, the third alleged error is made dependent upon the result of the first and second, or, in other words, it is not insisted that the judgment is excessive of that the plaintiff has not established that he is entitled to P1,237.50, in case he is entitled to any amount. Neither does counsel contend that the defendant is relieved from all liability for the noncompliance with the contract on account of the order of the Australian government prohibiting the exportation of flour if the sale is not a perfected one. As thus presented, our inquiry is limited to the determination of the question whether or not the contract and the facts found show a perfected sale.

In the case of *Yu Tek & Co. vs. Gonzalez* (29 Phil. Rep., 384), we said:

"This court has consistently held that there is a perfected sale with regard to the 'thing' whenever the article of sale has been physically segregated from all other articles."

In the case under consideration, the undertaking of the defendant was to sell to the plaintiff 1,000 sacks of "Mano" flour at P11.05 per barrel, 500 sacks to be delivered in September and 500 in October. There was no delivery, at all under the contract. If called upon to designate the article sold, the defendant could only say that it was "Mano" flour. There was no appropriation of any particular lot of flour. The flour mentioned in the contract was not "physically segregated from all other articles." In fact, the defendant did not have in its possession in Manila, at the time the contract was entered into, the 1,000 sacks of flour which it agreed, to deliver in September and October. It is therefore clear that under the rule laid down in the case of *Yu Tek & Co.*, *supra*, and the cases cited in that opinion, the sale here in question was not a perfected one.

For the foregoing reasons, the judgment appealed from is affirmed, with costs against the appellant. So ordered.

Arellano, C. J., Torres, and Carson, JJ., concur.

Moreland, J., see concurring opinion.

CONCURRING OPINION

MORELAND, J.:

If the conclusions of law set out in the syllabus in this case are correct the judgment should be reversed instead of affirmed. The action is for breach of contract of sale. The only defense offered is that the breach has, in law, been excused. The court holds, if its syllabus may be taken as a guide, that there never was a contract at all between the parties; which, if true, precludes a recovery by plaintiff. The syllabus says:

"A contract of sale is not perfected where the parties have agreed upon the price and the thing sold, unless the latter has been selected and is capable of being physically designated and distinguished from all others of the same class."

Note that this says that the contract of sale is not perfected, etc. In the body of the decision the court says: "It is therefore clear that under the rules laid down * * * the sale here in question was not a perfected one." Note that this says that the "sale is not a perfected one." There is a very wide difference between an unperfected (imperfect) contract and an unperfected sale. If a contract is not complete, that is, perfected, it is no contract, and creates no obligations; while a "sale" will bind the parties to it even though not "perfected" There is a manifest inconsistency, if not contradiction, between the decision of the court and the syllabus. If the syllabus is correct then the decision is wrong; and if the decision is correct the syllabus is wrong. If the contract was not perfected, completed, it was not binding and no action would lie for its breach; whereas if, as the court holds, an action for breach lies, then the contract was a complete and perfect contract.

The contract was a perfect contract. The essentials of a contract are found in article 1261 of the Civil Code. It reads:

"There is no contract unless the following requisites exist: (1) The consent of the contracting parties. (2) A definite object which may be the subject of the contract. (3) The consideration for the obligation which may be established."

Article 1254 provides that:

"A contract exists from the moment one or more persons consent to bind himself or themselves, with regard to another or others, to give something or to render some service;" while article 1258 declares when contracts are perfected. It provides:

"Contracts are perfected by mere consent, and from that time they are binding, not only with regard to the fulfillment of what has been expressly stipulated, but also with regard to all the consequences which, according to their character, are in accordance with good faith, use, and law."

There is nowhere in the Civil Code a requirement that, in order that a contract, of whatever kind, shall be perfect, that is, binding on the parties, the subject-matter thereof must be segregated or set apart by itself, or be "capable of being physically designated and distinguished from all others of the same class." There is no such requirement even with respect to a contract of sale. This contract is perfected in the same manner as all other contracts—by mere consent; and the essentials thereof are those of all other contracts, consent, subject-matter, and consideration: a contract of sale is perfected and binding "there having been an agreement as to the thing and price." Article 1451 provides this in express terms. It says:

"A promise to sell or buy, there being an agreement as to the thing and price, gives a right to the contracting parties to mutually demand the fulfillment of the contract."

Nothing is said about the necessity of the "thing" being "segregated" or "set apart by itself," or of being "capable of being physically designated or distinguished from all others of the same class." It is not even essential that the "thing" be in existence at the time the contract is made. Innumerable binding contracts are made daily concerning matters not in existence.

From what has been said I am forced to conclude that the statement of the syllabus that "a contract of sale is not perfected where the parties have agreed upon the price and the thing sold, unless the latter has been selected and is capable of being physically designated or distinguished from all others of the same class," is not, as I understand it, a correct statement of what the court decided or of the law on the subject.

The decision, however, is correct in saying that a sale (not a contract of sale) is not perfected unless the subject-matter thereof "has been physically segregated from all other articles." But the objection I make is that, while the statement, as a statement, is correct, it has nothing to do with and bears no relation to the case before the court or the question raised or to be decided therein. Otherwise, I am unable to follow the reasoning of the court in its decision. The action, as I have said, is for a breach of contract of sale. The legality and validity of the contract are admitted, as is also the breach thereof. The only question before the court, indeed, the only question raised by anybody, is whether the breach has been excused. The only question discussed by the court, as I understand it, is one altogether different. If the contract of sale is valid, and no one questions that, and if there was a breach, and no one questions that (laying to one side the claim of defendant that plaintiff waived the breach), what is there left for consideration more than the justifiability of the breach and, in case it was not justifiable, the amount of damages? Nothing; and the parties have raised and discussed nothing else, as I understand the case. This, however, is precisely the question which the court has not touched.

What has the question whether the sale was perfected or not to do with this case? The parties are not concerned with a perfected sale or any other kind of sale, but with a contract of sale only. Indeed, the action is expressly brought for a breach of a contract of sale without regard to the ownership of the property or the rights of the parties therein. Whether or not the sale was a "perfected" sale is of no consequence in the resolution of this case. That question can be material only when it is to be determined who must suffer if the thing sold is lost, destroyed, or damaged, or who shall be entitled to the increase thereof or the profit produced by it before actual delivery. Except for this purpose the question whether a sale is "perfected" or not is immaterial—indeed, it cannot arise in

any way in any case. To determine who shall run the risk of loss or have the opportunity to claim the profits produced by the thing sold before actual delivery thereof has been made, the Civil Code contains various cogent provisions. Article 1462 defines a delivery. It provides:

"A thing sold shall be considered as delivered when it is placed in the hands and possession of the vendee. When the sale should be made by means of a public instrument, the execution thereof shall be equivalent to the delivery of the thing which is the object of the contract, if in said instrument the contrary does not appear or may be clearly inferred."

It then tells us, by article 1450, when the title passes, i. e., from what instant the purchaser takes the risk of the loss of the thing bought and is entitled to the profits produced by it. It states:

"The sale (not contract) shall be perfected between vendor and vendee and shall be binding on both of them, if they have agreed upon the thing which is the object of the contract and upon the price, even when neither has been delivered."

Article 1452 declares what law shall govern the rights which accrue by virtue of article 1450. It is as follows:

"The injury to or the profit of the thing sold shall, after the contract has been perfected, be governed by the provisions of articles 1096 and 1182."

Articles 1182 to 1186 declare the various conditions under which the vendor is excused from delivery. They provide:

"Art. 1182. An obligation, consisting in the delivery of a specified thing, shall be extinguished when said thing should be lost or destroyed without fault of the debtor and before he should be in default

"Art. 1183. Whenever the thing should be lost, when in the possession of the debtor, it shall be presumed that the loss occurred by his fault and not by a fortuitous event, unless there is proof to the contrary and without prejudice to the provisions of article 1096.

"Art. 1184. In obligations to do, the debtor shall also be released when the prestation appears to be legally or physically impossible.

"Art. 1185. When the debt for a certain and specified thing arises from a crime or misdemeanor the debtor shall not be exempted from the payment of its value, whatever the cause of the loss may have been, unless, having offered the thing to the person who should have received it, the latter should have refused to accept it without reason.

"Art. 1186. After the obligation is extinguished by the loss of the thing, all the actions which the debtor may have against third persons, by reason thereof shall pertain to the creditor."

Article 1096 defines the rights of the parties to the sale under other conditions:

"Should the thing to be delivered be a specified one the creditor, independently of the right granted him by article 1101, may compel the debtor to make the delivery. Should the thing be undetermined or generic he may ask that the obligation be fulfilled at the expense of the debtor. Should the person obligated be in default, or be bound to deliver the same thing to two or more different persons, he shall be liable therefor with regard to unforeseen events until the delivery is made."

Article 1105 deals with the liability of the parties when there intervenes fortuitous and unavoidable events and is as follows:

"No one shall be liable for events which could not be foreseen, or which having been foreseen were inevitable, with the exception of the cases expressly mentioned in the law or those in which the obligation so declares."

As is seen from article 1450, the relative rights of the parties to a contract of sale in the thing sold date from the moment when the sale is perfected. Prior to that moment the purchaser has no interest in the thing sold. It is owned absolutely by the vendor. After that moment the purchaser has rights in it. Articles 1096 and 1182 determine what they are. The only reason for the existence of article 1450 is to fix in as definite a way as possible the time when the purchaser acquires rights, not in the contract of sale (rights in that contract date from the instant it was perfected as provided in article 1451), but in the thing sold. This being so it is clear that whether the sale is perfected or not has no significance, consequence, or materiality unless the parties, or either of them, assert an interest in the property itself. If the sale is perfected the purchaser may lay claim to the thing sold; if it is not perfected he cannot. It is only in the determination of the rights of the parties in the thing sold that the question of whether the sale is perfected becomes material. The articles quoted, and especially article 1450, have nothing to do with the responsibility of the parties under the contract as denned by article 1445. Article 1450 simply paves the way for article 1452 which provides, as we have seen, that "the injury to or the profit of the thing sold shall, after the contract has been perfected, be governed by the provision of articles 1096 and 1182." Article 1450 simply states when the sale shall be deemed to be perfected, the sole purpose of which is, as already set out, to determine definitely who shall sustain the loss which the thing sold may suffer and who shall take the profits which it produces, before actual delivery. These articles have nothing to do with the validity of the contract of sale or with the consequences flowing from a breach thereof as that contract is defined by article 1445.

The action before us is one for simple breach of contract. There is no question here as to plaintiff's or defendant's interest in the flour itself. The plaintiff claims no interest therein. The defendant claims none. Both parties admit that defendant never obtained delivery of the flour; that its delivery was prevented by the action of the Australian government as a war measure. Not being able to secure delivery itself the defendant could not deliver it to plaintiff in pursuance of the contract. This being so no question arose or could arise as to who must assume the responsibility for loss of or damage to the flour or who take the increase of or the profits produced by it. Therefore, no question arose or could arise as to whether the sale was perfected or not, as that question presents itself only when it must be determined at whose risk the property is, or questions involving an interest in the property.

I repeat, the only question raised or argued is, Was the breach of the contract excused by the intervention of the European war by reason of which the exportation of flour from Australia was prohibited? Whether the sale was a perfected sale or not has nothing to do with that question; inasmuch as, if the completion of the contract was prevented by a fortuitous event, if we may call the prohibition of the Australian government a fortuitous event as defined by the Civil Code (art. 1105), the vendor would be excused whether the sale was perfected or not. No one contends, least of all the appellant, that the title to the flour passed under the contract and much less that there was a delivery. Neither does appellant contend that the flour was at the vendee's risk. Appellant in its answer and in many places in its brief admits that title had not passed and that no delivery had been made; indeed, its whole case is based on the proposition that it had broken its contract with plaintiff and that it was liable in damage unless the breach was excused by the supervention of war or by agreement of the parties. It is true that the appellant discussed in its brief the question whether the document on which the action is brought is an executory contract of sale or a "perfected sale," but not, however, for the purpose of claiming that the title to the flour passed to plaintiff and that it was, therefore, at his risk, as appellant nowhere claims that but admits the contrary, but under the wholly mistaken belief that the law relating to fortuitous events as found in the Civil Code applies only to a "perfected sale" and does not to an executory contract of sale. In other words, he argues for a "perfected sale" not to put the flour at plaintiff's risk, but to bring his admitted breach of the contract within the provisions of the Civil Code relating to fortuitous events. Appellant sums up its whole contention in the last two paragraphs of its brief preceding the prayer for relief, which prove conclusively that the only question really raised or presented by

appellant was as I have stated. They read: "Having arrived at the conclusion that Exhibit A is a contract of sale it is unquestionable that it is subject to the law relating to fortuitous events; in other words, that the contracting parties are not responsible for unforeseen events, or those which, if foreseen, were unavoidable, except in those cases where the law provides the contrary." "It having been proved, as we have said, that the failure to comply with the contract was due to a fortuitous event, the defendant is relieved of all responsibility, and the court erred in giving judgment against it * * *." It is clear from these quotations that the appellant never intended to raise the question exclusively considered by the court, the sole purpose in speaking of perfected sale being to excuse the breach which, if excusable at all, would be as much so whether the sale was perfected or not.

The remarks already made apply, generally speaking, with equal force to the case of *Yu Tek & Co. vs. Gonzalez* (29 Phil. Rep., 384), cited in the opinion of the court in this case. There defendant agreed to sell and deliver to plaintiff a certain quantity of sugar which he did not have and which, so far as is known, was not in existence at the time the contract was made. No question, therefore, of injury, loss, or profit could arise. His defense was that he was prevented from delivering the sugar not because it was lost or destroyed but because the weather never permitted him to produce it. Such a defense, if it is a defense at all, falls under article 1105 and not under articles 1450, 1452, 1096, and 1182, cited by the court in that case, or any of them. Neither in the case cited nor in the one at bar was there a claim that the thing sold was lost or injured. The sole claim and defense was that the fulfillment of the contract was rendered impossible by an act of God which prevented the thing sold from coming into existence. In one case the weather prevented the growth of the sugar and in the other the war prevented the delivery of the flour. In neither case was there a claim that the thing sold was specified or set apart or even in existence; and the only question presented in that case as well as in this was whether the defendants were relieved under article 1105 and not under 1450, 1452, 1182 and 1096.

The contract in the case at bar is one for the sale and delivery of a thing which in all probability did not exist at the time the parties contracted. Certainly the parties did not know whether it existed or not. It seems that the flour had to be manufactured in Australia before the delivery agreed upon could be made. The whole trouble was caused by the failure of the manufacturers in Australia to deliver to the defendant. To this kind of contract articles 1450, 1452, 1096, and 1182 do not apply; there can be no perfected sale when the thing sold is not yet in existence and, consequently, there can be no question over the loss or injury to the thing or the profits which it produces before delivery. The flour never had an existence and the relations between the contracting parties never proceeded further than the mere words which formed the contract. There was, therefore, never a moment when the question as to whether it was a perfected contract could arise. The only articles applicable or claimed to be applicable were 1445 and 1105, to which I see no reference in the decision.

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