

**SMITH, BELL & CO., LTD., PLAINTIFF AND APPELLANT, VS.
VICENTE SOTELO MATTI, DEFENDANT AND APPELLANT.***G. R. No. 16570. March 09, 1922*

Ponente: ROMUALDEZ, J.

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In August, 1918, the plaintiff corporation and the defendant, Mr. Vicente Sotelo, entered into contracts whereby the former obligated itself to sell, and the latter to purchase from it two steel tanks, for the total price of twenty-one thousand pesos (P21,000), the same to be shipped from New York and delivered at Manila "within three or four months;" two expellers at the price of twenty-five thousand pesos (P25,000) each, which were to be shipped from San Francisco in the month of September, 1918, or as soon as possible; and two electric motors at the price of two thousand pesos (P2,000) each, as to the delivery of which stipulation was made, couched in these words: "Approximate delivery within ninety days.-This is not guaranteed."

The tanks arrived at Manila on the 27th of April, 1919; the expellers on the 26th of October, 1918; and the motors on the 27th of February, 1919.

The plaintiff corporation notified the defendant, Mr. Sotelo, of the arrival of these goods, but Mr. Sotelo refused to receive them and to pay the prices stipulated.

The plaintiff brought suit against the defendant based on four separate causes of action, alleging, among other facts, that it immediately notified the defendant of the arrival of the goods, and asked instructions from him as to the delivery thereof, and that the defendant refused to receive any of them and to pay their price. The plaintiff, further, alleged that the expellers and the motors were in good condition. (Amended complaint, pages 16-30, Bill of Exceptions.)

In their answer, the defendant, Mr. Sotelo, and the intervenor, the Manila Oil Refining and By-Products Co., Inc., denied the plaintiff's allegations as to the shipment of these goods and their arrival at Manila, the notification to the defendant, Mr. Sotelo, the latter's refusal to receive them and pay their price, and the good condition of the expellers and the motors, alleging as special defense that Mr. Sotelo had made the contracts in question as manager of the intervenor, the Manila Oil Refining and By-products Co., Inc., which fact was known to the plaintiff, and that "it was only in May, 1919, that it notified the intervenor that said tanks had arrived, the motors and the expellers having arrived incomplete and long after the date stipulated." As a counterclaim or set-off, they also allege that, as a consequence of the plaintiff's delay in making delivery of the goods, which the intervenor intended to use in the manufacture of coconut oil, the intervenor suffered damages in the sums of one hundred sixteen thousand seven hundred eighty-three pesos and ninety-one centavos (P116,783.91) for the nondelivery of the tanks, and twenty-one thousand two hundred and fifty pesos (P21,250) on account of the expellers and the motors not having arrived in due time.

The case having been tried, the court below absolved the defendants from the complaint insofar/as the tanks and the electric motors were concerned, but rendered judgment against them, ordering them to "receive the aforesaid

expellers and pay the plaintiff the sum of fifty thousand pesos (P50,000), the price of the said goods, with legal interest thereon from July 26, 1919, and costs."

Both parties appeal from this judgment, each assigning several errors in the findings of the lower court.

The principal point at issue in this case is whether or not, under the contracts entered into and the circumstances established in the record, the plaintiff has fulfilled, in due time, its obligation to bring the goods in question to Manila. If it has, then it is entitled to the relief prayed for; otherwise, it must be held guilty of delay and liable for the consequences thereof.

To solve this question, it is necessary to determine what period was fixed for the delivery of the goods.

As regards the tanks, the contracts A and B (pages 61 and 62 of the record) are similar, and in both of them we find this clause:

"To be delivered within 3 or 4 months-The promise or indication of shipment carries with it absolutely no obligation on our part-Government regulations, railroad embargoes, lack of vessel space, the exigencies of the requirements of the United States Government, or a number of causes may act to entirely vitiate the indication of shipment as stated. In other words, the order is accepted on the basis of shipment at Mill's convenience, time of shipment being merely an indication of what we hope to accomplish."

In the contract Exhibit C (page 63 of the record), with reference to the expellers, the following stipulation appears:

"The following articles, hereinbelow more particularly described, to be shipped at San Francisco within the month of September /18, or as soon as possible.-Two Anderson oil expellers * * *."

And in the contract relative to the motors (Exhibit D, page 64, rec.) the following appears:

"Approximate delivery within ninety days.-This is not guaranteed.-This sale is subject to our being, able to obtain Priority Certificate, subject to the United States Government requirements and also subject to confirmation of manufacturers."

In all these contracts, there is a final clause as follows:

"The sellers are not responsible for delays caused by fires, riots on land or on the sea, strikes or other causes known as 'Force Majeure' entirely beyond the control of the sellers or their representatives."

Under these stipulations, it cannot be said that any definite date was fixed for the delivery of the goods. As to the tanks, the agreement was that the delivery was to be made "within 3 or 4 months," but that period was subject to the contingencies referred to in a subsequent clause. With regard to the expellers, the contract says "within the month of September, 1918," but to this is added "or as soon as possible." And with reference to the motors, the contract contains this expression, "Approximate; delivery within ninety days," but right after this, it is noted that "this is not guaranteed."

The oral evidence falls short of fixing such period.

From the record it appears that these contracts were executed at the time of the world war when there existed rigid restrictions on the export from the United States of articles like the machinery in question, and maritime, as well as railroad, transportation was difficult, which fact was known to the parties; hence clauses were inserted in the contracts, regarding "Government regulations, railroad embargoes, lack of vessel space, the exigencies of the requirements of the United States Government," in connection with the tanks and "Priority Certificate, subject to the United States Government requirements," with respect to the motors. At the time of the execution of the contracts, the parties were not unmindful of the contingency of the United States Government not allowing the

export of the goods, nor of the fact that the other foreseen circumstances therein stated might prevent it.

Considering these contracts in the light of the civil law, we cannot but conclude that the term which the parties attempted to fix is so uncertain that one cannot tell just whether, as a matter of fact, those articles could be brought to Manila or not. If that is the case, as we think it is, the obligation must be regarded as conditional.

"Obligations for the performance of which a day certain has been fixed shall be demandable only when the day arrives.

"A day certain is understood to be one which must necessarily arrive, even though its date be unknown.

"If the uncertainty should consist in the arrival or non-arrival of the day, the obligation is conditional and shall be governed by the rules of the next preceding section" (referring to pure and conditional obligations). (Art. 1125, Civ. Code.)

And as the export of the machinery in question was, as stated in the contract, contingent upon the sellers obtaining certificate of priority and permission of the United States Government, subject to the rules and regulations, as well as to railroad embargoes, then the delivery was subject to a condition the fulfillment of which depended not only upon the effort of the herein plaintiff, but upon the will of third persons who could in no way be compelled to fulfill the condition. In cases like this, which are not expressly provided for, but impliedly covered, by the Civil Code, the obligor will be deemed to have sufficiently performed his part of the obligation, if he has done all that was in his power, even if the condition has not been fulfilled in reality.

"In such cases, the decisions prior to the Civil Code have held that the obligee having done all that was in his power, was entitled to enforce performance of the obligation. This performance, which is fictitious-not real-is not expressly authorized by the Code, which limits itself only to declare valid those conditions and the obligation thereby affected; but it is neither disallowed, and the Code being thus silent, the old view can be maintained as a doctrine." (Manresa's commentaries on the Civil Code [1907], vol. 8, page 132.)

The decisions referred to by Mr. Manresa are those rendered by the supreme court of Spain on November 19, 1866, and February 23, 1871.

In the former it is held:

"First. That when the fulfillment of the condition does not depend on the will of the obligor, but on that of a third person who can in no way be compelled to carry it out, and it is found by the lower court that the obligor has, done all in his power to comply with the obligation, the judgment of the said court, ordering the other party to comply with his part of the contract, is not contrary to the law of contracts, or to Law 1, Tit. I, Book 10, of the 'Novisima Recopilacion,' or Law 12, Tit. 11, of Partida 5, when in the said finding of the lower court, no law or precedent is alleged to have been violated." (Jurisprudencia Civil published by the directors of the Revista General de Legislation y Jurisprudencia [1866], vol. 14, page 656.)

In the second decision, the following doctrine is laid down:

"Second. That when the fulfillment of the condition does not depend on the will of the obligor, but on that of a third person, who can in no way be compelled to carry it out, the obligor's part of the contract is complied with if he does all that is in his power, and has the right to demand performance of the contract by the other party, which is the doctrine laid down also by the supreme court." (The same publication [1871], vol. 23, page 492.)

It is sufficiently proven in the record that the plaintiff has made all the efforts it could possibly be expected to make under the circumstances, to bring the goods in question to Manila, as soon as possible. And, as a matter of fact, through such efforts, it succeeded in importing them and placing them at the disposal of the defendant, Mr. Sotelo, in April, 1919. Under the doctrine just cited, which, as we have seen, is of the same juridical origin as our

Civil Code, it is obvious that the plaintiff has complied with its obligation.

In connection with this obligation to deliver, occurring in a contract of sale like those in question, the rule in North America is that when the time of delivery is not fixed in the contract, time is regarded unessential.

"When the time of delivery is not fixed or is stated in general and indefinite terms, time is not of the essence of the contract." (35 Cyc., 179. And see *Montgomery vs. Thompson*, 152 Cal, 319; 92 Pac, 866; *O'Brien vs. Higley*, 162 Ind., 316; 70 N. E., 242; *Pratt vs. Lincoln* [Me. 1888], 13 Atl., 689; *White vs. McMillan*, 114 N. C, 349; 19 S. E., 234; *Ballantyne vs. Watson*, 30 U. C. C. P., 529.)

In such cases, the delivery must be made within a reasonable time.

"The law implies, however, that if no time is fixed, delivery shall be made within a reasonable time, in the absence of anything to show that an immediate delivery is intended." (35 Cyc, 179, 180.)

"When the contract provides for delivery 'as soon as possible' the seller is entitled to a reasonable time, in view of all the circumstances, such as the necessities of manufacture, or of putting the goods in condition for delivery. The term does not mean immediately or that the seller must stop all his other work and devote himself to that particular order. But the seller must nevertheless act with all reasonable diligence or without unreasonable delay. It has been held that a requirement that the shipment of goods should be the 'earliest possible' must be construed as meaning that the goods should be sent as soon as the seller could possibly send them, and that it signified rather more than that the goods should be sent within a reasonable time.

"Delivery 'Shortly'. - In a contract for the sale of personal property to be delivered 'shortly' it is the duty of the seller to tender delivery within a reasonable time and if he tenders delivery after such time the buyer may reject.

* * * *

"The question as to what is a reasonable time for the delivery of the goods by the seller is to be determined by the circumstances attending the particular transaction, such as the character of the goods, and the purpose for which they are intended, the ability of the seller to produce the goods if they are to be manufactured, the facilities available for transportation, and the distance the goods must be carried, and the usual course of business in the particular trade." (35 Cyc, 181-184.)

Whether or not the delivery of the machinery in litigation was offered to the defendant within a reasonable time, is a question to be determined by the court.

"Applications of rule. - A contract for delivery 'about Nov. 1' is complied with by delivery on November 10 (*Whilte vs. McMillan*, 114 N. C, 349; 19 S. E., 234. And see *O'Brien vs. Higley*, 162 Ind., 316; 70 N. E., 242); and a contract to deliver 'about the last of May or June' is complied with by delivery on the last day of June (*New Bedford Copper Co. vs. Southard*, 95 Me., 209; 49 Atl., 1062, holding also that if the goods were to be used for a ship to arrive 'about April' and the vessel was delayed, the seller might deliver within a reasonable time after her arrival, although such reasonable time extended beyond the last of June); so under a contract to deliver goods sold 'about June, 1906', delivery may be made during the month of June, or in a reasonable time thereafter (*Loomis vs. Norman Printers' Supply Co.*, 81 Conn., 343; 71 Atl., 358)," (35 Cyc., 180, note 16.)

The record shows, as we have stated, that the plaintiff did all within its power to have the machinery arrive at Manila as soon as possible, and immediately upon its arrival it notified the purchaser of the fact and offered to deliver it to him. Taking these circumstances into account, we hold that the said machinery was brought to Manila by the plaintiff within a reasonable time.

Therefore, the plaintiff has not been guilty of any delay in the fulfillment of its obligation, and, consequently, it could not have incurred any of the liabilities mentioned by the intervenor in its counterclaim or set-off.

Besides, it does not appear that the intervenor, the Manila Oil Refining and By-Products Co., Inc., has in any way taken part in these contracts. These contracts were signed by the defendant, Mr, Vicente Sotelo, in his individual capacity and own name. If he was then acting as agent of the intervenor, the latter has no right of action against the herein plaintiff.

"When an agent acts in his own name, the principal shall have no right of action against the persons with whom the agent has contracted, or such persons against the principal.

"In such case, the agent is directly liable to the person with whom he has contracted, as if the transaction were his own. Cases involving things belonging to the principal are excepted.

"The provisions of this article shall be understood to be without prejudice to actions between principal and Agent." (Civil Code, art. 1717.)

"When the agent transacts business in his own name, it shall not be necessary for him to state who is the principal and he shall be directly liable, as if the business were for his own account, to the persons with whom he transacts the same, said persons not having any right of action against the principal, nor the latter against the former, the liabilities of the principal and of the agent to each other always being reserved." (Code of Com., art. 246.)

"If the agent transacts business in the name of the principal, he must state that fact; and if the contract is in writing, he must state it therein or in the subscribing clause, giving the name, surname, and domicile of said principal.

"In the case prescribed in the foregoing paragraph, the contract and the actions arising therefrom shall be effective between the principal and the persons or person who may have transacted business with the agent; but the latter shall be liable to the persons with whom he transacted business during the time he does not prove the commission, if the principal should deny it, without prejudice to the obligation and proper actions between the principal and agent." (Code of Com., art. 247.)

The foregoing provisions lead us to the conclusion that the plaintiff is entitled to the relief prayed for in its complaint, and that the interverior has no right of action, the damages alleged to have been sustained by it not being imputable to the plaintiff.

Wherefore, the judgment appealed from is modified, and the defendant, Mr. Vicente Sotelo Matti, sentenced to accept and receive from the plaintiff the tanks, the expellers and the motors in question, and to pay the, plaintiff the sum of ninety-six thousand pesos (P96,000), with legal interest thereon from July 17, 1919, the date of the filing of the complaint, until fully paid, and the costs of both instances. So ordered.

Araullo, C. J., Johnson, Street, Malcolm, Avanceña, Villamor, Ostrand, and Johns, JJ., concur.

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