

LIM SIENGCO, PLAINTIFF AND APPELLANT, VS. LO SENG, DOING BUSINESS UNDER THE STYLE OF LO SENG & CO., DEFENDANT AND APPELLANT.*G.R. No. 20923, February 25, 1924*

Ponente: STREET, J.

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Upon November 13, 1919, the present action was instituted in the Court of First Instance of Manila by Lim Siengco to recover of Lo Seng, upon the first cause of action stated in the complaint, the sum of P15,282.28, consisting partly of money advanced by the plaintiff to the defendant and partly of a claim for damages for breach of the contracts for the purchase of alcohol, and in his second cause of action the sum of P818, the value of wine and demijohns alleged to have been sold and delivered to the defendant. In connection with the institution of this action, the plaintiff caused an attachment to be levied upon certain property of the defendant, but this attachment was afterwards dissolved by the court. On November 17, 1919, the defendant interposed an answer, in which he admitted liability to a certain extent, alleging, however, that the plaintiff on his part had breached the contract respecting the alcohol by refusing to pay for the same as delivered. By way of counterclaim the defendant sought to recover the sum of P30,000, as damages for the wrongful suing out of the attachment. At the hearing the trial judge absolved the defendant from the plaintiff's complaint and absolved the plaintiff from the defendant's counterclaim. From this judgment both parties appealed in so far as the decision was prejudicial to each of them respectively.

It appears that in July, 1919, the defendant, Lo Seng, was doing business as a distiller of alcohol, under the name of Lo Seng & Co., with his office at 414 T. Pinpin Street, Manila, while the plaintiff, Lim Siengco, was a merchant residing in the same city. On July 16, of said year, Lo Seng, as manager of Lo Seng & Co., contracted in writing to sell to Lim Siengco 1,000 arrobas of refined alcohol, 182° proof, at the price of P7 per arroba. The first delivery was stipulated to be made on August 15, 1919, with weekly deliveries of 150 arrobas of said alcohol until delivery should be completed.

On the same day Lo Seng contracted in writing to sell to the same Lim Siengco 6,000 arrobas of crude alcohol, of 80° proof, at the price of P3 per arroba. It was agreed that deliveries under this contract should be made at the rate of 1,000 arrobas commencing July 30 and at intervals of about fifteen days thereafter until the entire quantity should be delivered. In connection with this contract for the sale of the crude alcohol Lim Siengco advanced the sum of P1,500 at the time of the making of the contract, and another sum of P1,500 on July 24, thereafter. A little later Lim Siengco delivered another P1,000, making P4,000 in all advanced by the plaintiff upon this contract. It was also stipulated that upon each delivery of crude alcohol made by Lo Seng as per contract, the plaintiff should pay to Lo Seng only P2.50 per arroba of the contract price, leaving 50 centavos of the value of each arroba to be credited upon the advancements made as already stated.

Some time after these contracts were made, Lo Seng & Co. delivered about 128 arrobas of fine alcohol and about

468 arrobas of crude alcohol, after which no deliveries whatever were made upon the contract.

On or about September 22 the manager of the plaintiff, one Lim Chiu, called upon the manager of Lo Seng, one Simonson, and made inquiry as to the reason for the failure of Lo Seng & Co. to make deliveries of the alcohol as agreed. Simonson told Lim Chiu that Lo Seng had departed from the Philippine Islands and would not be back for more than two weeks. Simonson further told Lim Chiu that he (Simonson) personally knew nothing about the contract which Lim Chiu claimed to have with Lo Seng, and that he (Simonson) could not, or would not, honor said contract. Nevertheless he suggested to Lim Chiu that if the plaintiff had to have alcohol immediately a certain amount would be supplied at a price greater than that stipulated but somewhat under the price then prevailing in the market, and that upon Lo Seng's return the matter could be taken up with him by Lim Chiu and they could adjust it as they saw fit.

One of the excuses made then, or at some other time, for the failure of Lo Seng & Co. to deliver the alcohol covered by said contracts was that a typhoon had lately prevailed in the province where the distillery was located and that on this account the distillery had not been operated lately with efficiency. Another explanation, no doubt, is to be found in the condition of the market for alcohol, the price of which began to rise in August and September and which continued to progress upwards for several months, until fine alcohol was sold for P12 or P15 and crude alcohol for nearly P4.

It further appears that in the months of August and September, 1919, Lo Seng bought of the plaintiff a quantity of wine (vino tinto) and received also a number of empty demijohns, of the combined value of P818.

The first error assigned by the plaintiff-appellant has reference to the action of the court in dissolving the preliminary attachment. We think that this assignment of error is not well taken, as it does not appear that any sufficient ground of attachment in fact existed; and upon the facts appearing upon affidavits before him the action taken by the trial judge in dissolving the attachment cannot be said to have been improper.

The second assignment of error has reference to the action of the trial court in failing to give judgment upon the second cause of action. This assignment of error is well taken, and the failure of the trial court to give judgment in favor of the plaintiff upon the item therein claimed was, we suppose, due to a mere oversight on the part of his Honor. The account set forth in this cause is clearly proved by the plaintiff's witness, Lim Chiu, manager of the business of Lim Siengco, and furthermore the answer admits that the wine and demijohns were received as claimed. It is true that the -answer asserts that some of the demijohns were returned, without saying how many or of what value; but no proof at all was submitted by the defendant to sustain this assertion. The plaintiff should clearly have judgment for the sum of P818, being the amount claimed upon the second cause of action.

The plaintiff-appellant's third assignment of error has reference to the refusal of the trial court to award damages to the plaintiff for breach of contract by the defendant. This assignment of error also is well taken, but not, we think, to the extent claimed in the plaintiff's brief upon appeal.

It is proved and not denied that the plaintiff advanced P4,000, upon the contract for crude alcohol. In return for this he has received alcohol, both crude and fine, of a total value of P2,507.79, at the prices contracted to be paid for the two sorts of alcohol respectively. Upon liquidation of accounts this leaves a balance due to the plaintiff of P1,492.21, which should undoubtedly be refunded. In the answer of the defendant it is claimed that at a date subsequent to the making of the contract, the contracts referred to had been changed by mutual agreement and that the plaintiff, in consideration of the difficulties in which Lo Seng & Co. found itself, had agreed to pay higher prices for alcohol than the prices stated in the contract. There is no proof to support this contention, though it is admitted that the plaintiff did, after repudiation of the contracts by Lo Seng & Co., pay for certain alcohol delivered by Lo Seng & Co. at prices agreed upon by the parties, which prices were higher than the contract

prices. Lim Chiu, the manager of the plaintiff's business, explains this by saying that his firm had to have alcohol and had to get it wherever they could and furthermore that he bought some alcohol from Lo Seng & Co. for cash, as claimed and for higher prices than was stipulated in the contract. But this he says was due to necessity. The incident is also explained by Simonson's affidavit (used at the trial as a deposition), wherein he states that he advised Lim Chiu to take alcohol from Lo Seng & Co. upon prices then fixed by Simonson, with the understanding that when Lo Seng should return the matter could be adjusted with him. At any rate there is no proof whatever that the plaintiff ever waived his contracts or agreed to any change therein by which the price of alcohol was changed from that stipulated. It results that the plaintiff is clearly entitled to recover this item of P1,492.21, as the balance due upon the amount advanced by him upon the making of the contracts referred to.

This brings us to consider the item of damages for breach of contract incident to the failure of the defendant to supply alcohol upon the dates and in the amounts stated in the two contracts. In connection with the claim for damages the plaintiff's manager prepared an exhibit on January 31, 1920, in which he stated the damages as representing the difference between the price stipulated in the contract and the price of fine and crude alcohol in the market on the date the account was stated. This mode of stating the damages resulting to the plaintiff is incorrect, the true measure of damages being the difference between the contract price and the price prevailing in the market at the stipulated time and place of delivery.

From something said in the appealed decision it seems that the trial judge entertained the idea that the plaintiff could not recover any damages unless he should show that he was compelled to buy alcohol in the open market to replace that which the defendant had contracted to deliver; and his Honor refused to allow any damages because the plaintiff had not clearly shown that he had really purchased crude and fine alcohol of the kind expressed in the contract and the prices paid therefor. This idea is entirely unsound. If the plaintiff had in fact been compelled to buy alcohol like that contracted for from some other person than the defendant, this would have been competent proof on the question of damages, if the purchase was effected at a higher price than that stipulated in the contract with the defendant. But the right of the plaintiff to recover damages was not absolutely dependent upon proof of this character. As already stated the correct measure of damages is to be found in the difference between the contract price and the price prevailing in the market at the time and place stipulated for the deliveries.

Now, as bearing upon the question of the true measure of damages, we note that a competent witness, Mr. A. B. Powell, was examined with reference to the prices prevailing in Manila for crude and fine alcohol of the quantity contracted for during the period from July to December, 1919 (transcript of session, Dec. 13, 1922, p. 10). Taking the prices stated by him as approximately true, and estimating the prices of the crude and fine alcohol at the times and in the amounts stipulated for delivery, we estimate roughly that there was a loss to the plaintiff of about P4,610, by reason of the failure of the defendant to make deliveries upon his contracts at the times agreed.

Summing up the three items above specified and deducting therefrom the amount of P909.84, which represents, according to Simonson, the value of a delivery of alcohol of September 22, 1919, which the plaintiff did not pay for, we have in round numbers the sum of P 6,000, which in our opinion is proper to be allowed the plaintiff upon the two causes of action set forth in the complaint. There is no proof to sustain the claim for damages set forth in the defendant's counterclaim, and the trial judge committed no error in absolving the plaintiff therefrom.

For the reasons stated, the action of the trial judge in absolving the defendant from the plaintiff's complaint will be reversed; and the plaintiff will recover of the defendant the sum of P6,000, with interest at 6 per cent from November 13, 1919. The action of the trial court in absolving the plaintiff from the counterclaim will be affirmed. No special pronouncement will be made as to costs. So ordered.

Araullo, C. J., Johnson, Avancena, Ostrand, Johns, and Romualdez JJ., concur.

Malcolm, J., dissents.

Judgment affirmed in part and reversed in part.

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