

## PHILIPPINE MANUFACTURING CO., PLAINTIFF AND APPELLANT, VS. GO JOCCO, DEFENDANT AND APPELLEE.

*G.R. No. 24256. January 21, 1926*

Ponente: OSTRAND, J.

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### OSTRAND, J.:

On October 25, 1922, the plaintiff and the defendant entered into the following contract (Exhibit A):

"CONTRACT

"MANILA, October 25, 1922

"Messrs. Go Jocco

"Manila, P. I.

"As brokers duly authorized, we have on this date sold by order and for the accounts of yourselves to Messrs. Philippine Manufacturing Co., Inc., Manila, P. I., 500 tons of coconut oil for the price of twenty-seven and a half centavos per kilo ex tanque.

"The delivery shall be made within 35 days, that is, between November 1st and December 5, 1922, inclusive.

"The purchaser shall pay the vendor the total amount of this contract on the 15th of November, 1922.

"Should the purchaser take the oil a few days before November 15, 1922, the purchaser shall pay to the vendor all the amount of the aforesaid contract two days before delivery.

"Should the purchaser fail to take the oil until the 5th day of December, 1922, said purchaser shall pay the vendor as storage the sum of P50 for each successive day.

"The state or class of the oil: Not more than 6% F. F. A.

"Conformes:

"PHIL. MF'G . CO. (Sgd.) "GO JOCCO

(Sgd.) "S.W. MASON

"Vendor

Vendee

"BERMUDEZ & BAUTISTA

"By (Sgd.) BERMUDEZ

"Brokers"

The oil purchased was stored in the defendant's tanks Nos. 6 and 7 and, previously to the closing of the contract, the plaintiff's secretary and chemist, Mr. S. W. Mason, took samples of the oil from said tanks for analysis. The testimony is uncontradicted that on November 15, 1922, the defendant, in conformity with the terms of the contract Exhibit A, endeavored to collect the price of the oil from the plaintiff, but was told by Mr. Mason that it would first be necessary to measure the contents of the tanks and to again examine the oil. On the same day, Mason went to the defendant's establishment and took new samples of the oil from the tanks for chemical analysis. He thereupon ordered his men to close the tanks by placing padlocks on the valves, he retaining the keys. After having done so, he advised the defendant that he would analyze the samples and that if the result was satisfactory, payment would be made at once, and later in the day the plaintiff gave the defendant its check for P137,500, the full amount of the contract purchase price.

On November 17, 1922, the plaintiff sold the oil by contract in writing to the Portsmouth Cotton Oil Refining Corporation at the price of P7.50, United States currency, per 100 pounds, C. I. F., Norfolk, Virginia, the contract containing the following provision as to the quality of the oil:

"Coconut Oil bases 5 per cent free fatty acid, Maximum 7 per cent free fatty acid shall be fair average of the season of the country in which it is pressed, and shall be sold on basis 5 per cent free fatty acid, one per cent moisture and impurities; provided, however, that any oil which exceeds 5 per cent free fatty acid but does not exceed 7 per cent free fatty acid, shall not be rejected but shall be reduced in price one half of one per cent for each one per cent excess acidity over 5 per cent, fractions in proportion."

In the morning of November 27, 1922, the oil was drawn from the tanks by the plaintiff and brought aboard the tank steamer Acme for shipment to the Portsmouth Cotton Oil Refining Corporation at Norfolk, Virginia, together with other oil manufactured by the plaintiff and by the Philippine Vegetable Oil Company, the whole shipment amounting to approximately 901 long .tons. Mr. Mason was present when the oil was removed from the defendant's tanks.

Mr. Ericksen of the firm of Morton & Ericksen, marine and cargo surveyors, surveyed the ship's tank No. 2 in which the shipment in question was carried. In his certificate of survey, Exhibit B, he states among other things:

"Temperatures were taken and samples drawn of oil loaded into No. 2 tank, port and starboard sections Steamship Acme from Philippine Manufacturing Co.'s storage tank A, Philippine National Oil Co.'s Storage Tanks Nos. 5 and 7, and from tank lighters Quinan which were loaded from P. V. O. Storage Tank No. 21. All these samples were submitted to Bureau of Science, Manila, for determination of specific gravity and weight per cu. ft.

"Samples of oil were also drawn from vessel's tank, both sections, after all oil was loaded on board and submitted to Bureau of Science for analysis. Samples of this oil drawn from vessel's tanks will be forwarded to Fireman's Fund Insurance Co., San Francisco."

On the arrival of the Acme at Norfolk, the Portsmouth Cotton Oil Refining Corporation refused to accept the oil on the ground that it was contaminated with cottonseed oil and, in accordance with the contract between the parties, the matter was submitted to the New York Produce Exchange Arbitration Committee for arbitration. Samples alleged to have been taken from the shipment were tested by the Bureau of Chemistry of the New York Produce Exchange through the so-called Halphen test, and were found to be contaminated with cottonseed oil. As to the proceedings before the Arbitration Committee, Mr. Berry, the plaintiff's vice-president and treasurer, who at that time was in New York, makes the following statement in a letter to the defendant dated July 6, 1923:

"The matter was discussed, each side given an opportunity to present its arguments and examine the other's

witnesses and statements. However, the purchaser produced a certificate of the Bureau of Science of Manila showing that an examination made of the oil taken from your tanks showed the presence of Kapok Seed Oil. This certificate, showing the condition of the oil before it was loaded into the deep tanks of the vessel, appeared to convince the committee that the purchaser's claim was justified. The committee called us back again the next day and asked whether we would be willing to agree with the purchaser to receive the rejection of the oil and replace it with oil of good tender or what objections we could possibly have to granting the allowance asked for. There was every indication shown by the committee that its decision would decidedly be in favor of the purchaser. The writer had been in close touch with the market and knew just what could be done with the oil if the decision was against us. Realizing that the committee would not render a decision in our favor, the writer made a proposition to the purchaser in the presence of the arbitration committee to buy back the oil from him on the basis of 8 7/8 ¢ per pound c. i. f. The purchaser was not enthusiastic about releasing the oil at this price as he figured he was practically certain of a decision of the committee which would grant him an allowance of 1 cent gold per pound, but the committee insisted that he accept the proposition advanced, which was considered fair. However, the committee decided that in addition to the purchase price of the oil the purchaser was entitled to all of the expenses incurred up to that time. As soon as the matter was closed the oil was placed in the hands of Zimmermann Alderson Carr Company for sale and sale was effected two days later to Messrs. Proctor & Gamble Company on the basis of 9 ¼ ¢ tank cars Cincinnati, which was approximately the equivalent of \$.0894 Norfolk. The sale was closed and the oil disposed of in this manner."

The contract of sale to Proctor & Gamble Co. reads as follows:

"NEW York, March 19, 1923.

"PHILIPPINE MANUFACTURING COMPANY

"Manila, P. I. Sellers

"THE PROCTOR & GAMBLE COMPANY

"Cincinnati, Ohio—Buyers

"GENTLEMEN: Confirming telephone conversation, we confirm having sold to-day to:

"Purchaser: The Proctor & Gamble Company.

"For account of: Philippine Manufacturing Company.

"Article: Two million twenty-nine thousand four hundred (2,029,400) lbs. Manila Coconut Oil, as per sample submitted and approximately equal to Still well & Glading's analysis of February 3d, 1923.

"Price: All at a price of nine and one-quarter (9¼) cents per lb., cost and freight Cincinnati, Ohio.

"Shipment: Immediate from Norfolk, Va. "Weights: Actual weight of oil in tank cars as shown by Public Weighmaster's certificates.

"Terms and conditions: Net cash in exchange for bills of lading, payable in New York City funds, in United States Gold, or its equivalent in currency. Sellers not responsible for contingencies beyond their control.

"Brokerage: To be paid by sellers;

"ZIMMERMANN ALDERSON CARR CO.

(Sgd.) "R. N. Ball

"This confirmation is made in triplicate, one copy being sent to the sellers, one to the buyers, and one retained on file in this office. Kindly sign one copy of this confirmation and return to us for exchange with" other party to the trade for completion of their files.

"Accepted: PHILIPPINE MFG. COMPANY

(Sgd.) "BRYCE LE JENNE

"Sellers Agt.

"Accepted: THE PROCTOR & GAMBLE CO.

(Sgd.) "F. M. BARNEY

"Buyers"

Though the price at which the oil was sold to Proctor & Gamble Co. was considerably higher than the price agreed upon with the Portsmouth Cotton Oil Refining Corporation, the expenses for rent of cars, transportation, brokerage, etc., greatly exceeded the difference and the plaintiff maintains that it suffered a loss of P21,263.04. The first intimation given the defendant of dissatisfaction with the quality of the oil purchased from him was the following letter from the plaintiff:

"February 8, 1923.

"Mr. GO JOCCO

"212-214 Rosario "Manila, P. I.

"Dear Sir: We have received a cable from the United States stating that the oil delivered to us by you contained kapok or cottonseed oil. The buyers in the United States are claiming damages. We will call upon you to stand any loss or damage due to this cause. Official samples taken from tanks at your plant show the presence of kapok or cottonseed oil as analyzed by the Bureau of Science.

"Very truly yours,

"PHILIPPINE MANUFACTURING COMPANY

"By (Sgd.) S. W. MASON

"Secretary"

After some more fruitless correspondence, the present action was brought on December 27, 1923, the plaintiff alleging the principal facts herein-before set forth and asking damages in the sum of P21,263.04, Philippine currency. The defendant answered with a general denial and set up as special defenses that under the provisions of paragraph 1 of article 336 of the Code of Commerce, the plaintiff had no right of action having examined the oil at the time of its delivery; that conceding without admitting that the oil was defective in quality, the plaintiff had lost its right of action by failing to make its claim within thirty days immediately following the delivery; that the loss plaintiff alleged to have suffered was due to its own fault; that the coconut oil sold and delivered to the plaintiff by the defendant was of the quality called for in the contract of sale; and that the oil having been delivered to, tested, accepted and paid for by the plaintiff, the respective obligations of the parties were, then and there terminated and extinguished.

The trial of the case consumed considerable time and the case was not decided until March 15, 1925. In its decision absolving the defendant from the complaint and from which the plaintiff appeals, the Court of First Instance, after a fairly exhaustive discussion of the evidence, found in substance that it had not been sufficiently established that the oil purchased from the defendant was contaminated at the time of its delivery to the plaintiff; that upon the evidence there was reason to believe that certain samples analyzed by the Bureau of Science and found positive for kapok oil were not taken from the oil sold by the defendant and that such contamination as there may have been of the oil shipped to the Portsmouth Cotton Oil Refining Corporation, was likely to have been caused through the impurity of the oil manufactured by the plaintiff itself, in view of the fact that said plaintiff was partly engaged in the manufacture of kapok oil while the defendant neither dealt in nor manufactured such oil. The court further found that the plaintiff, before closing its contract with the defendant, examined the oil

to its satisfaction and that therefore the first paragraph of article 336 of the Code of Commerce was applicable to the case and the plaintiff's cause of action extinguished.

The findings of the court below are vigorously assailed by counsel for the appellant, but after a careful examination of the record, we are not prepared to say that the court erred in its appreciation of the evidence to such an extent as to justify a reversal of its decision. In addition to direct evidence adduced by the defendant, there are also several circumstances which, in our opinion, have not been very satisfactorily explained by the plaintiff and which tend to support the conclusions of the trial court and to cast doubt on the correctness of the plaintiff's contention that the oil bought from the defendant was contaminated by an admixture of kapok oil.

But assuming that such contamination existed, we would still be of the opinion that the plaintiff has established no cause of action. The comparatively small quantity of kapok oil alleged to have been mixed with the coconut oil can only be regarded as an impurity and did not change the essential character of the merchandise; this is sufficiently shown by the fact that it after analysis was sold by the plaintiff to Proctor & Gamble Co. as "Manila Coconut Oil" and at the current New York price for that article. In contradistinction to the contract between the plaintiff and the Portsmouth Cotton Oil Refining Corporation, the contract of sale between the plaintiff and the defendant contains no express warranty against impurities aside from the stipulation that not more than 5 per cent of free fatty acid would be allowed. This is, therefore, not an action on an express warranty.

In the absence of an examination of the oil by the plaintiff, the latter might have had a right of action on an implied warranty under article 336 of the Code of Commerce, which in part reads 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."

As it appears that the plaintiff examined the oil to his satisfaction, it is evident that he cannot now rely on this article for his cause of action.

The result will be the same if we regard the impurity complained of as a latent defect which could not be discovered by an ordinary examination. The case would then come under article 342 of the Code of Commerce, but the right of action mentioned in that article was extinguished by the failure of the plaintiff to present his claim within thirty days from the delivery of the merchandise (*Kelly Springfield Road Roller Co. vs. Sideco*, 16 Phil., 345; *Government of the Philippine Islands vs. Inchausti & Co.*, 24 Phil., 315).

There being no express warranty and the plaintiff having lost its right of action on the implied warranties as to the quality of the merchandise, it must now necessarily base its cause of action on fraud under article 344 of the Code which reads as follows:

"Commercial sales shall not be rescinded by reason of lesion; but the contracting party who acted with malice or fraud, in the contract or in its fulfillment, shall indemnify for loss and damage, without prejudice to the criminal action which may be proper."

The law on the subject of frauds with reference to sales is practically the same in this jurisdiction as in the United States and we may, therefore, freely refer to American authorities in that connection. Alison, in his work on Contracts, 7th edition, at page 165, defines fraud as "a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it." Concealment of the truth is sometimes equivalent to false representations, and it is here argued that the defendant in not disclosing the existence of kapok oil in the oil sold to the plaintiff, was guilty of fraud. In regard to such concealments or nondisclosures, Mechem, citing authorities, says:

"The concealment which shall amount to a false representation is that only which may properly be designated as active. Mere passive non-disclosure which, as has been seen, may suffice to vitiate a contract uberrimae fidei, will not be sufficient here; 'there must be an active attempt to deceive, either by a statement which is false or which is true so far as it goes, but is accompanied with such a suppression of facts as to convey a misleading impression. 'There must be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false.'

\* \* \*"

(Mechem on Sales, section 868.)

As will be seen, an intention to deceive or mislead the other party to his prejudice is an essential element of the fraud here considered. It is true that such an intention may sometimes be imputed upon the principle that the party must be presumed to intend the necessary consequences of his own acts or conduct, and need not necessarily be proven by direct evidence, but in the present case we search the record in vain for anything from which that intention may be definitely inferred. We may, perhaps, surmise that had there been any mixing of other oils with the coconut oil in question, the defendant would have been aware thereof, but there is nothing from which we can presume that the defendant intended to mislead the plaintiff to his prejudice. It is not disputed that at the time the sale was made, kapok oil commanded a higher price in the market than did coconut oil and the defendant may well have been under the impression that a slight admixture of kapok oil did not substantially impair the general market value of the oil purchased. Indeed, there is nothing in the evidence to show that for ordinary purposes, the coconut oil suffered any material impairment in value from the mixture and it is to be observed that the defendant was not advised of the fact that the oil was sold to the Portsmouth Cotton Oil Refining Corporation under an express warranty against impurities and possibly for a special purpose. That it was still of good merchantable quality clearly appears from the fact that it was bought by Proctor & Gamble Co. at current market prices. And when it is further considered that the plaintiff, before purchasing, was given full opportunity to examine the oil and actually did so, it seems obvious that the evidence is not sufficient to overcome the presumption of good faith and to establish fraud on the part of the vendor. In commercial sales, the fact that the vendor does not volunteer detailed statements of all he knows, whether important or not, in regard to the goods sold by him, is not fraud per se.

The judgment appealed from is affirmed with the costs against the appellant. So ordered.

Avanceña, C. J., Street, Malcolm, Villamor, Romualdez, and Villa-Real, JJ., concur.

Johnson and Johns, JJ., did not take part.

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