

**BLOSSOM & COMPANY, INC., PLAINTIFF AND APPELLANT, VS.
MANILA GAS CORPORATION, DEFENDANT AND APPELLEE.***G.R. No. 32958. November 08, 1930*

Ponente: JOHNS, J.

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body { font-family: Verdana, Geneva, Arial, helvetica, sans-serif; font-size:80%; background-color:#FFFFFF; margin:0 2% 0 2%; text-align: justify; } h1 { font-family:times; } h2 { background-color:#cccccc; padding:10px 0 10px 0; font-weight: bold; text-align: center; } h3 { font-weight: bold; text-transform: uppercase; text-align: center; } div#footer { font-size:9px; }

In this action plaintiff seeks to recover damages from the defendant which it claims to have sustained after September, 1923, arising from, and growing out of, its original contract of September 10, 1918, as modified on January 1, 1919, to continue for a period of ten years from that date.

In paragraph VIII of its complaint, plaintiff alleges that about the last part of July, 1920, the defendant "willfully and deliberately breached its said contract," and that it "flatly refused to make any deliveries under said contract, and finally on November 23, 1923," it was forced to commence action in the Court of First Instance against the defendant, known as case No. 25352, to recover the damages which it had then sustained by reason of such flagrant violation of said contract on the part of the defendant, in which judgment was rendered in favor of the plaintiff and against the defendant for P26,119.08, as damages "suffered by this plaintiff by the defendant's breach of said contract from July, 1920, up to and including September, 1923, with legal interest thereon from November 23, 1923, and for the costs," in which the court refused to order the defendant to resume the delivery of the coal and water gas tar to the plaintiff, in accord with said contract, but left it with its remedy for damages against the defendant for any subsequent breaches of the contract. A copy of that judgment, which was later affirmed by this court, is attached to, marked Exhibit G, and made a part of, the complaint in this action.

In their respective briefs, opposing counsel have much to say about the purpose and intent of that judgment, and it is vigorously asserted that it was never intended that it should be or become a bar to another action by the plaintiff to recover any damages it may have sustained after September, 1923, during the remainder of the ten-year period of that contract. Be that as it may, it must be conceded that the question as to what would be the legal force and effect of that judgment in that case was never presented to, or decided by, the lower court or this court. In the very nature of things, neither court in that case would have the power to pass upon or decide the legal force and effect of its own judgment, for the simple reason that it would be premature and outside of the issues of any pleading, and could not be raised or presented until after the judgment became final, and then only by an appropriate plea, as in this case.

Plaintiff specifically alleges that the defendant willfully and deliberately breached the contract, and "flatly refused to make any deliveries under said contract," by reason of which it was forced to and commenced its former action in which it was awarded P26,119.Q8 damages against the defendant by reason of its breach of the contract from July, 1920, to September, 1923.

In the final analysis, plaintiff in this action seeks to recover damages growing out of, and arising from, other and different breaches of that same contract after November, 1923, for the remainder of the ten-year period, and the question is thus squarely presented as to whether the rendition of the former judgment is a bar to the right of the plaintiff to recover damages from and after September, 1923, arising from, and growing out of, breaches of the original contract of September 10, 1918, as modified on January 1, 1919. That is to say, whether the plaintiff, in a former action, having recovered judgment for the damages which it sustained by reason of a breach of its contract by the defendant up to September, 1923, can now in this action recover damages it may have sustained after September, 1923, arising from, and growing out of, a breach of the same contract, upon and for which it recovered its judgment in the former action. In the former action in which the judgment was rendered, it is alleged in the complaint:

" '7. That about the last part of July or the first part of August, 1920, the Manila Gas Corporation, the defendant herein, without any cause ceased delivering coal and water gas tar to the plaintiff herein; and that from that time up to the present date, the plaintiff corporation, Blossom & Company, has frequently and urgently demanded of the defendant, the Manila Gas Corporation, that it comply with its aforesaid contract Exhibit A by continuing to deliver coal and water gas tar to this plaintiff—but that the said defendant has refused, and still refuses, to deliver to the plaintiff any coal and water gas tar whatsoever under the said contract Exhibit A, since the said month of July,

" '9. That owing to the bad faith of the said Manila Gas Corporation, defendant herein, in not living¹ up to its said contract Exhibit A, made with this plaintiff, and refusing now to carry out the terms of the same, by delivering to this plaintiff the coal and water gas tar mentioned in the said Exhibit A, has caused to this plaintiff great and irreparable damages amounting to the sum total of one hundred twenty-four thousand eight hundred forty-eight pesos and seventy centavos (P124,848.70); and that the said defendant corporation has refused, and still refuses, to pay to this plaintiff the whole or any part of the aforesaid sum.

" '10. That the said contract Exhibit A, was to be in force until January 1, 1929, that is to say, for ten (10) years counted from January 1, 1919; and that, unless the defendant again commence to furnish and supply this plaintiff with coal and water gas tar, as provided for in the said contract Exhibit A, the damages already suffered by this plaintiff will continually increase and become larger and larger in the course of years preceding the termination of the said contract on January 1, 1929.'" In that action plaintiff prays for judgment against the defendant:

" ' (a) That upon trial of this cause judgment be rendered in favor of the plaintiff and against the defendant for the sum of P124,848.70, with legal interests thereon from November 23, 1923;

""(6) That the court specifically order the defendant to resume the delivery of the coal and water gas tar to the plaintiff under the terms of the said contract Exhibit A of this complaint.' "

In the final analysis, plaintiff must stand or fall on its own pleadings, and tested by that rule, it must be admitted that the plaintiff's original cause of action, in which it recovered judgment for damages, was founded on the ten-year contract, and that the damages which it then recovered were recovered for a breach of that contract.

Both actions are founded on one and the same contract. By the terms of the original contract of September 10, 1918, the defendant was to sell and the plaintiff was to purchase three tons of water gas tar per month from September to January 1, 1919, and twenty tons of water gas tar per month after January 1, 1919, one-half ton of coal gas tar per month from September to January 1, 1919, and six tons of coal gas tar per month after January 1, 1919. That from and after January 1, 1919, plaintiff would take at least the quantities specified in the contract of September 10, 1918, and that at its option, it would have the right to take the total output of water gas tar of defendant's plant and 50 per cent of the gross output of its coal gas tar, and upon giving ninety days' notice, it would have the right to the entire output of coal gas tar, except such as the defendant might need for its own use.

That is to say, the contract provided for the delivery to the plaintiff from month to month of the specified amounts of the different tars as ordered and requested by the plaintiff. In other words, under plaintiff's own theory, the defendant was to make deliveries from month to month of the tars during the period of ten years, and it is alleged in both complaints that the defendant broke its contract, and in bad faith refused to make any more deliveries.

In 34 Corpus Juris, p. 839, it is said:

"As a general rule a contract to do several things at several times is divisible in its nature, so as to authorize successive actions; and a judgment recovered for a single breach of a continuing contract or covenant is no bar to a suit for a subsequent breach thereof. But where the covenant or contract is entire, and the breach total, there can be only one action, and plaintiff must therein recover all his damages."

In the case of Roehm vs. Horst, 178 U. S., 1; 44 Law. ed., 953, that court said:

"An unqualified and positive refusal to perform a contract, though the performance thereof is not yet due, may, if the renunciation goes to the whole contract, be treated as a complete breach which will entitle the injured party to bring his action at once."

15 Ruling Case Law, 966, 967, sec. 441, says:

"Similarly if there is a breach by the vendor of a contract for the sale of goods to be delivered and paid for in installments, and the vendee maintains an action therefor and recovers damages, he cannot maintain a subsequent action to recover for the failure to deliver later installments,"

In Pakas vs. Hollingshead, 184 N. Y., 211; 77 N. E., 40; 3 L. R. A. (N. S.), 1042, the syllabus says:

"Upon refusal, by the seller, after partial performance, longer to comply with his contract to sell and deliver a quantity of articles in installments, the buyer cannot keep the contract in force and maintain actions for breaches as they occur, but must recover all his damages in one suit."

And on page 1044 of its opinion, the court says:

"The learned counsel for the plaintiff contends that the former judgment did not constitute a bar to the present action, but that the plaintiff had the right to elect to waive or disregard the breach, keep the contract in force, and maintain successive actions for damages from time to time as the installments of goods were to be delivered, however numerous these actions might be. It is said that this contention is supported in reason and justice, and has the sanction of authority at least in other jurisdictions. We do not think that the contention can be maintained. There is not, as it seems to us, any judicial authority in this state that gives it any substantial support. On the contrary, we think that the cases, so far as we have been able to examine them, are all the other way, and are to the effect that, inasmuch as there was a total breach of the contract by the defendants' refusal to deliver, the plaintiff cannot split up his demand and maintain successive actions, but must either recover all his damages in the first suit or wait until the contract matured or the time for the delivery of all the goods had arrived. In other words, there can be but one action for damages for a total breach of an entire contract to deliver goods, and the fact that they were to be delivered in installment from time to time does not change the general rule."

The case of L. Bucki & Son Lumber Co. vs. Atlantic Lumber Co. (109 Federal, 411), of the United States Circuit Court of Appeals for the Fifth Circuit, is very similar.

The syllabus says:

"1. Contracts—Construction—Entire Contract.—A contract was made for the sale of a large quantity of logs to be delivered in monthly installments during a period of eight years, payments to be made also in installments at times having relation to the deliveries. It contained stipulations as to such payments, and guaranties as to the

average size of the logs to be delivered in each installment. Held, that it was an entire contract, and not a number of separate and independent agreements for the sale of the quantity to be delivered and paid for each month, although there might be breaches of the minor stipulations and warranties with reference thereto which would warrant suits without a termination of the contract.

"2. Judgments—Matters Concluded—Action for Breach of Indivisible Contract.—The seller declared the contract terminated for alleged breaches by the purchaser, and brought suit for general and special damages, the latter covering payments due for installments of logs delivered. By way of set-off and recoupment against this demand, the purchaser pleaded breaches of the warranty as to the size of the logs delivered during the months for which payment had not been made. Held, that the judgment in such action was conclusive as to all claims or demands of either party against the other growing out of the entire contract, and was a bar to a subsequent suit brought by the purchaser to recover for other breaches of the same warranty in relation to deliveries made in previous months."

On page 415 of the opinion, the court says:

"When the contract was ended, the claims of each party for alleged breaches and damages therefor constituted an indivisible demand; and when the same, or any part of the same, was pleaded, litigation had, and final judgment rendered, such suit and judgment constitute a bar to subsequent demands which were or might have been litigated. (Baird vs. U. S., 96 U. S., 430; 24 L. ed., 703.)"

In *Watts vs. Weston* (238 Federal, 149), Circuit Court of Appeals, Second Circuit, the syllabus says:

"1. Judgment—593—Judgment as Bar—Matters Concluded.—Where a continuing contract was terminated by the absolute refusal of the party whose action was necessary to further perform, a claim for damages on account of the breach constituted an indivisible demand, and when the same or any part of the same was pleaded, litigated, and final judgment rendered, such suit and judgment constitute a bar to subsequent demands which were or might have been litigated therein."

And on page 150 of the opinion, the court says:

"It is enough to show the lack of merit in the present contention to point out as an inexorable rule of law that, when Knevals' contract was discharged by his total repudiation thereof, Watts' claims for breaches and damages therefor 'constituted an indivisible demand, and when the same, or any part of the same, was pleaded, litigation had and final judgment rendered, such suit and judgment constitute a bar to subsequent demands which were or might have been litigated.' (Bucki, etc., Co. vs. Atlantic, etc., Co., 109 Fed. at page 415; 48 C. C. A., 459; Cf. Landon vs. Bulkley, 95 Fed., 344; 37 C. C. A., 96.)

"The rule is usually applied in cases of alleged or supposed successive breaches, and consequently severable demands for damages; but if the contract has been discharged by breach, if suit for damages is all that is left, the rule is applicable, and every demand arising from that contract and possessed by any given plaintiff must be presented (at least as against any given defendant) in one action; what the plaintiff does not advance he foregoes by conclusive presumption."

In *Abbott vs. 76 Land and Water Co.* (118 Pac, 425; 161 Cal., 42), at page 428, the court said:

"In *Fish vs. Folley*, 6 Hill (N. Y.), 54, it was held, in accord with the rule we have discussed, that, where the defendant had covenanted that plaintiff should have a continual supply of water for his mill from a dam, and subsequently totally failed to perform for nine years, and plaintiff brought an action for the breach and recovered damages sustained by him to that time, the judgment was a bar to a second action arising from subsequent failure to perform, on the theory that, although the covenant was a continuing one in one sense, it was an entire contract, and a total breach put an end to it, and gave plaintiff the right to sue for an equivalent in damages.

"In such a case it is no warrant for a second action that the party may not be able to actually prove in the first action all the items of the demand, or that all the damage may not then have been actually suffered. He is bound to prove in the first action not only such damage as has been actually suffered, but also such prospective damage by reason of the breach as he may be legally entitled to, for the judgment he recovers in such action will be a conclusive adjudication as to the total damage on account of the breach."

It will thus be seen that, where there is a complete and total breach of a continuous contract for a term of years, the recovery of a judgment for damages by reason of the breach is a bar to another action on the same contract for and on account of the continuous breach.

In the final analysis, there is no real dispute about any material fact, and the important and decisive question is the legal construction of the pleadings in the former case and in this case, and of the contract between the plaintiff and the defendant of January 1, 1920.

The complaint in the former case specifically alleges that the defendant "has refused, and still refuses, to deliver to the plaintiff any coal and water gas tar whatsoever under the said contract Exhibit A, since the said month of July, 1920." "That owing to the bad faith of the said Manila, Gas Corporation, defendant herein, in not living up to its said contract Exhibit A, made with this plaintiff, and refusing now to carry out the terms of the same." That is a specific allegation not only of a breach of the contract since the month of July, 1920, but of the bad faith of the defendant in its continuous refusal to make deliveries of any coal and water gas tar. That amended complaint was filed on July 11, 1924, or four years after the alleged bad faith in breaking the contract.

Having recovered damages against it, covering a period of four years, upon the theory that the defendant broke the contract, and in bad faith refused to make deliveries of either of the tars, how can the plaintiff now claim and assert that the contract is still in force and effect? In the instant case the plaintiff alleges and relies upon the ten-year contract of January 1, 1920, which, in bad faith was broken by the defendant. If the contract was then broken, how can it be enforced in this action?

It is admitted that the defendant never made any deliveries of any tar from July, 1920, to April, 1926. Also that it made nine deliveries to plaintiff of the minimum quantities of coal and water gas tar from April 7, 1926, to January 5, 1927.

Plaintiff contends that such deliveries were made under and in continuation of the old contract.

March 26, 1926, after the decision of this court affirming the judgment in the original action, plaintiff wrote the defendant :

"* * * It is our desire to take deliveries, the minimum quantities set forth therein and appreciate to have you advise us how soon you will be in a to make deliveries; * * *

* * * in view of the fact that you have only effected settlement up to November 23, 1923, please inform us what adjustment you are willing to make for the period of time that has since elapsed without your complying with the contract."

In response to which on March 31, 1926, the defendant wrote this letter to the plaintiff:

"In reply to your letter of March 26th, 1926, in regard to tar, we beg to advise you that we are prepared to furnish the minimum quantities of coal and water gas tars as per your letter, viz: twenty tons of water gas tar and six tons of coal gas tar. The price figured on present costs of raw materials is P39.01 (Thirty-nine and 01/100 Pesos) per ton of water gas and P33.59 (Thirty-three and 59/100 Pesos) per ton of coal tar.

"We shall expect you to take delivery and pay for the above amount of tars at our factory on or before April 7th prox.

"Thereafter we shall be ready to furnish equal amounts on the first of each month. Kindly make your arrangements accordingly."

On January 29, 1927, the plaintiff wrote the defendant that:

"On July 31st last, we made demand upon you, under the terms of our tar contract, for 50 per cent of your total coal tar production for that month and also served notice on you that beginning 90 days from August 1st we would require your total output of coal tar monthly; this in addition to the 20 tons of water gas tar provided for in the contract to be taken monthly.

* * * * *

"We are here again calling on you for your total output of coal tar immediately and the regular minimum monthly quantity of water gas tar. In this connection we desire to advise you that within 90 days of your initial delivery to us of your total coal tar output we will require 50 per cent of your total water gas tar output, and, further, that two months thereafter we will require your total output of both tars."

February 2, 1927, the defendant wrote the plaintiff:

"Replying to your letter of Jan. 29, we would say that we have already returned to you the check enclosed therewith. As we have repeatedly informed you we disagree with you as to the construction of your contract and insist that you take the whole output of both tars if you wish to secure the whole of the coal tar. "With regard to your threat of further suits we presume that you will act as advised. If you make it necessary we shall do the same."

From an analysis of these letters it clearly appears that the plaintiff then sought to rely upon and enforce the contract of January 1, 1920, and that defendant denied plaintiff's construction of the contract, and insisted "that you take the whole output of both tars if you wish to secure the whole of the coal tar."

February 28, 1927, the plaintiff wrote the defendant:

"In view of your numerous violations of and repeated refusal and failure to comply with the terms and provisions of our contract dated January 30-31, 1919, for the delivery to us of water and coal gas tars, etc., we will commence action," which it did.

The record tends to show that the tars which the defendant delivered after April 7, 1926, were not delivered under the old contract of January 1, 1920, and that at all times since July, 1920, the defendant has consistently refused to make any deliveries of any tars under that contract.

The referee found as a fact that plaintiff was entitled to P2,219.60 for and on account of overcharges which the defendant made for the deliveries of fifty-four tons of coal gas tar, and one hundred eighty tons of water gas tar after April, 1926, and upon that point the lower court says:

"The fourth charge that plaintiff makes is meritorious. The price was to be fixed on the basis of raw materials. The charge for deliveries during 1926 were too high. In this I agree with entirely with the referee and adopt his findings of fact and calculations. (See Referee's report, p. 83.) The referee awarded for overcharge during the period aforesaid, the sum of P2,219.60. The defendant was trying to discourage plaintiff from buying tars and made the price of raw material appear as high as possible."

That finding is sustained upon the theory that the defendant broke its contract which it made with the plaintiff for the sale and delivery of the tars on and after April, 1926.

After careful study of the many important questions presented on this appeal in the exhaustive brief of the appellant, we are clearly of the opinion that, as found by the lower court, the plea of res judicata must be sustained. The judgment of the lower court is affirmed.

It is so ordered, with costs against the appellant.

Johnson, Street, Malcolm, Villamor, Ostrand, Romualdez and Villa-Real, JJ., concur.

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