44 Phil. 4

[G. R. No. 18756. November 07, 1922]

BAN KIAT & COMPANY, PLAINTIFF AND APPELLANT, VS. ATKINS, KROLL & COMPANY, DEFENDANT AND APPELLANT.

D E C I S I O N

STREET, J.:

This action was instituted in the Court of First Instance of the Province of Zamboanga by Ban Kiat & Co., a mercantile partnership engaged in business at Singapore, against Atkins, Kroll & Co., a mercantile partnership, doing business in the Philippine Islands and maintaining an agency in Zamboanga. The object of the proceeding is to recover the sum of $5,623.77, Singapore currency, due to the plaintiff as the purchase price of a quantity of galvanized iron roofing that had been sold by the plaintiff to the defendant under circumstances hereinafter set forth. To the original complaint the defendant in due course interposed its answer and a cross-complaint for the recovery of damages for alleged breach of contract connected with the same transaction.

Upon hearing the cause, the trial judge found that the debt of $5,623.77, Singapore currency, which is the subject of the complaint, was in fact due to the plaintiff; and judgment therefor was rendered in its favor. At the same time, however, his Honor awarded damages to the defendant to the extent of P1,999.50 upon its counterclaim, with the result that the plaintiff really recovered only the difference between these two amounts, with interest and costs. From «this judgment both parties appealed; and in this court each has assigned error, the plaintiff being dissatisfied with the action of the court in sustaining the cross-complaint while the defendant insists that the damages awarded to it upon the cross-complaint are inadequate.

No question is made by the defendant as to the amount of the claim which is the subject of the main action; and the controversy here is confined to the questions arising upon the cross-complaint. The facts essential to a decision are fortunately few and, being proved in

great part by documentary evidence, are not open to dispute.

It appears that in the latter part of the month of April, 1920, the Manila branch of the defendant company wrote to the Zamboanga branch asking for quotations on galvanized, corrugated roofing iron. Not having any in stock, the Zamboanga branch cabled to Ban Kiat & Co., at Singapore, requesting that it quote prices on that commodity directly to the Manila branch. In compliance with this request the plaintiff cabled to Atkins, Kroll & Co., Manila, offering the article at the price of "$4.30 per sheet c. i. f. Zamboanga, for 8 by 3 feet corrugations." To this message Atkins, Kroll & Co. replied in a cablegram, dated May 1, 1920, as follows:

> "Referring to your telegram we accept if 3 inches corrugated iron 28 gauge 8 feet by 3 feet 5,000 sheets May shipment c. i. f. Zamboanga in crates if possible currency Singapore $4.30 sheet telegraph your confirmation."

On May 6, 1920, Ban Kiat & Co. replied to the effect that the order had been accepted and that the roofing would be shipped within the current week. Four days later Ban Kiat & Co. advised by cable that shipment had been made by a certain steamer due to arrive in Zamboanga on May 25th. In a letter of May 13, 1920, directed to the Zamboanga branch of Atkins, Kroll & Co., Ban Kiat & Co. advised that an order had been received from Manila for "5,000 sheets 8 feet by 3 feet, 28 gauge corrugated iron."

The shipment above referred to arrived in due course at Zamboanga (although a few sheets short in quantity) and' was transshipped to Manila without examination.

Meanwhile, before the shipment arrived at its destination, Atkins, Kroll & Co., finding a market for the commodity in Manila, telegraphed an inquiry to Ban Kiat & Co. for an additional 2,000 sheets of galvanized iron "specifications same as last." Ban Kiat & Co. replied asking $4.50 per sheet; and the deal for the additional 2,000 sheets was closed at this figure. A few days later Ban Kiat & Co. advised Atkins, Kroll & Co. by letter that shipment had been made of 1,999 sheets 8 feet by 3 feet, 28 gauge corrugated iron. On June 3, 1920, Atkins, Kroll & Co. ordered an additional 500 sheets at same price and same specifications as the second shipment; and in response to this order Ban Kiat & Co. shipped 472 sheets.

The letters and invoices which passed between the parties relative to these orders leave no

possibility of doubt that the sheets contracted for were to be of the dimensions of 8 feet by 3 feet and of 28 gauge.

The first of these shipments to arrive in Manila was the second shipment containing 1,999 sheets, and upon examination, it was found that the sheets, instead of being of the dimensions and gauge contracted for, were 8 feet long by 26 inches wide and of 29 gauge. Upon ascertaining this fact by inspection Messrs. Atkins, Kroll & Co. immediately wrote to Ban Kiat & Co., under date of June 4, as follows:

> "Since our letter of the 3d inst. we have inspected shipment of iron ex. S. S. *Santa Cruz* and we must express surprise at the deviation of specifications between merchandise ordered and merchandise arrived. By referring to our cables and correspondence you will note we ordered galvanized sheets 8 ft. long by 3 ft. wide, 3″ corrugations and 28 gauge. The sheets you have shipped are 26 inches wide, 8 ft. long and 29 gauge.
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> "We find it difficult to understand how such a mistake could occur when our specifications were so definite. The width is a serious factor as if the iron had been even 3 feet wide before corrugating, it would be 32″ after corrugating. The gauge is also a factor. Twenty-eight gauge is .0156″ while twenty-nine gauge is only .014".
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> "It is within reason to have a difference in gauge due to the differences between U. S. Standard and British Standard gauge, but the width is matter of measuring which a child could accomplish. Twenty-six inches is certainly not three feet. The difference is only ten inches.
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> "We must make concessions to our buyers and while we will do the best possible, we must charge you for the amount of these concessions which are directly out of our pocket.
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> "We will hand you our bill as soon as we have gone into the matter with our buyers here."

Upon the arrival in Manila of the two other shipments the same lack of conformity as regards dimensions and gauge between the article contracted for and that delivered was found to exist; and as confirmatory of this, the defendant had each shipment surveyed by

two disinterested parties, one of whom was Wm. Swan, Lloyd's agent at Manila, and the other was Mr. Cresap, of the Luzon Brokerage Company, sending copies of the certificates of survey to the plaintiff.

On June 22, 1920, Atkins, Kroll & Co. followed up its protest of June 4 with a statement of account between the two houses, in which was included the loss incurred by- Atkins, Kroll & Co. as a consequence of the lack of correspondence between the dimensions of the roofing received and roofing ordered. This loss was chiefly computed on the basis of the difference in area of the sheets as ordered and as delivered, assuming that the width of 3 feet in the order meant 32 inches after corrugation. To the amount of $6,118.40, Singapore currency, thus ascertained, was added the survey fee (P30) and cost of reconditioning some of the roofing which, in the opinion of Lloyd's surveyor, had been caused by acid or water on original shipment (P160), making a total of $6,308.40, Singapore currency, as the loss resulting from the deficiencies mentioned.

It appears in evidence that, after the first order had been given, Atkins, Kroll & Co, began contracting for the sale of the roofing in the Manila market and managed to place contracts for the delivery of 7,000 sheets (8 ft. by 3 ft.) to responsible firms in this city,—all of which had been accomplished before the dimensions of the sheets ordered from Singapore had become known to Atkins, Kroll & Co.

As a result of the making of these contracts Atkins, Kroll & Co. found itself compromised, when the shipments arrived, by its obligations to its own customers, and it was compelled to make material concessions in price to such of them as were willing to accept the smaller sheets at all, with a consequent proven loss to Atkins, Kroll & Co. on these contracts of about P10,000.

Upon the facts above stated the liability of Ban Kiat & Co. for damages resulting to Atkins, Kroll & Co. by reason of breach of contract is undeniable; and the legal measure of damages is of course to be found in the difference in value in the Manila market of the article contracted for and that delivered. Upon this point it appears that if the roofing had been of the dimensions contracted for the value would have been in substantial conformity with the price at which

Atkins, Kroll & Co. had in fact contracted to sell it; while the value of the roofing delivered was certainly not in excess of what Atkins, Kroll & Co. received for it.

Now, though as we have just demonstrated, the profits actually realized by Atkins, Kroll &

Co. from these purchases fell short of their reasonable expectations by more than P10,000, nevertheless, we are of the opinion that the damages recoverable by Atkins, Kroll & Co. under the cross-complaint in this action should not exceed the amount of the claim submitted by Atkins, Kroll & Co. to Ban Kiat & Co. in the statement of June 22, 1920, already referred to. The reason for this is to be found in the consideration that, although Ban Kiat & Co. contracted to sell galvanized roofing of the dimensions of 8 feet by 3 feet, the price which that firm made must have been determined by the existing market price of sheets of the dimensions of 8 feet by 26 inches, such as it was actually carrying in stock, and if its sheeting had been of the dimensions of 8 feet by 3 feet, the price would naturally have been higher than that quoted to Atkins, Kroll & Co. The result of this mistake on the part of Ban Kiat & Co. was that Atkins, Kroll & Co. were able to contract for the purchase of sheets of the larger dimension at about the price that would probably have been demanded for sheets 8 feet by 26 inches. It was for this reason doubtless that Atkins, Kroll & Co., finding an opportunity to make purchases under such favorable conditions, gave a second and third order before the first shipment had arrived; and although Atkins, Kroll & Co. were disappointed' in the size of the sheets received, they were still able to market the sheeting received at a very respectable profit, and anything to be recovered by them in this cross action will be in the nature of additional profit.

These considerations were of course in the mind of Atkins, Kroll & Co. when the loss was computed as per statement of June 22 and submitted by it to Ban Kiat & Co.; and while that statement of account cannot be considered actually to constitute an estoppel in a legal sense, yet having been made with full knowledge of all the conditions, and with fair regard to the unfortunate predicament into which Ban Kiat & Co. had gotten, we are of the opinion that damages cannot be allowed in excess of the amount claimed in said statement. No litigant can justly reproach a tribunal of justice for accepting his own estimate of his damages, the same having been made with full knowledge of all the circumstances involved in the case, and with just regard to the circumstances of the debtor.

But it is urged in behalf of Ban Kiat & Co. that Atkins, Kroll & Co. is wholly disabled from maintaining its cross-action, by reason of the provisions of the second paragraph of article 336 of the Code of Commerce, which reads as follows:

> "A purchaser shall have a right of action against a vendor for defects in the quantity or quality of merchandise received in bales or packages, provided he brings his action within the four days following its receipt, and that the damage

is not due to accident or to natural defect of the merchandise or to fraud."

In this connection it is pointed out that Atkins, Kroll & Co. did not, within the four days following the delivery of the roofing, commence an action to recover compensation for the deficiency in the dimensions of the sheets, and the written claim that was submitted by letter of June 4 had reference only to the second shipment, which as previously stated arrived in Manila prior to the arrival of the other shipments. His Honor, the trial judge, sustained this contention of the plaintiff, as regards the first and third shipments, thereby disallowing the claim of Atkins, Kroll & Co. for the loss arising from the deficiency as to those shipments, but he sustained the cross-action so far as regards the second shipment, proceeding on the idea that the giving of written notice by the purchaser to the seller within the period of four days after receiving delivery of the second shipment constituted a compliance with the second paragraph of article 336 as regards that shipment. The result reached is called in question by both parties, that is to say, by the plaintiff in respect to the allowance of the counterclaim as to the second shipment, and by the defendant in respect to the disallowance of the counterclaim as to the first and third shipments. The concrete question thus presented for determination in this court is whether the second paragraph of article 336 of the Code of Commerce is still in force in this jurisdiction.

We are of the opinion that this question must be answered in the negative, for the reason that the paragraph referred to is a provision governing the prescription of actions and as such it has necessarily been abrogated by section 43, in relation with section 39 of the Code of Civil Procedure. In other words the period of prescription upon an action to recover damages for deficiency in the quantity of a commodity which is the subject of a mercantile contract of bargain and sale is the same as that applicable in other actions for damages resulting from breach of contract. Atkins, Kroll & Co. were therefore at liberty in this case to wait until they were sued upon the balance of the purchase price before moving judicially in the matter of recovering damages for the deficiency in the quantity of the material delivered.

We are aware that an idea has heretofore been entertained by some members of the legal profession in these Islands to the effect that the second paragraph of article 336 of the Code of Commerce does not fix a period of prescription but defines, instead, a condition precedent to the accrual of the right of action; from which the inference has been drawn that said provision has not been repealed by the Code of Civil Procedure. This view apparently had its origin in the analogy suggested by one or two decisions of this court on

other provisions of the Code of Commerce, presently to be mentioned; but a careful examination of the entire ground shows that the idea is without any sufficient basis and that the provision with which we are dealing is what it appears on its face to be, namely, a provision relating to the limitation of actions.

In the case of Government of the Philippine Islands vs. Inchausti & Co. (24 Phil., 315), the court had under consideration the second paragraph of subsection 2 of article 952 of the Code of Commerce, in which it is declared that actions for damages or defaults cannot be brought by a consignee of goods against the carrier if the proper *protests* or reservations should not have been made at the time of the delivery of the respective shipments, or within the twenty-four hours following when damages which do not appear on the exterior of the packages are in question; and the court held that this provision has not been abrogated by the provisions of the Code of Procedure relative to the prescription of actions. The idea upon which that decision proceeds is that the making of protest in the situations there supposed is a condition precedent to the accrual of the right of action. In Kelly Springfield Road Roller Co. vs. Sideco (16 Phil., 345, 353), this court invoked article 342 of the Code of Commerce upon the point that a purchaser who has not made any *claim* based on the inherent defects of the article sold, within the thirty days following its delivery, shall lose all right of action against the vendor for such defect. Other provisions of a somewhat similar nature in the Code of Commerce which have been recognized or applied by this court are found in article 366, which relates to claims against a carrier for damage or loss to goods in transit (Roldan vs. Lim Ponzo & Co., 37 Phil., 285), and article 835 which relates to claims for damage or loss resulting from collisions (U. S. vs. Smith, Bell & Co., 5 Phil., 85).

In the several provisions of the Code of Commerce referred to in the last paragraph, the making of the claim or protest is antecedent to the existence of the right of action. Quite different is the provision of the second paragraph of article 336, now under consideration, limiting the time for bringing the action to the four days immediately following delivery. Of course the institution of the action does not create the right of action. The right arises from the breach of duty on the part of the vendor and exists from the time default occurs. Clearly, this provision is of a purely prescriptive nature, and as such it has necessarily been abolished by the Code of Civil Procedure. In the case of Government of the Philippine Islands vs. Inchausti & Co. (24 Phil., 315), already cited, it was held that the first paragraph of subsection 2 of article 952 of the Code of Commerce, has been repealed by the Code of Civil Procedure, and the annotator of the current edition in English of the Code of Commerce recognizes that the prescriptive provisions generally of that Code have been abrogated in the same way (Espiritu, Code of Commerce, articles 942, *et seq*.). We are now

of the opinion, and accordingly hold, that the second paragraph of article 336 must be included among the repealed provisions.

The foregoing discussion conducts us to the conclusion that the cross action of Atkins, Kroll & Co. is maintainable for the recovery of the damages resulting from the deficiency in all three shipments of sheeting, and the amount due to the defendant upon this account is a proper subject of set-off and counterclaim against the demand of the plaintiff.

The decision appealed from will therefore be affirmed in so far as it awards judgment to the plaintiff, Ban Kiat & Co., against the defendant Atkins, Kroll & Co. for the sum of $5,623.77, Singapore currency, with legal interest from December 24, 1920, the date of the filing of the complaint; and said decision will be modified, in the part relating to the cross action, by allowing Atkins, Kroll & Co. to recover of Ban Kiat & Co. the sum of $6,308.40, Singapore currency, instead of P1,999.50, Philippine currency, with legal interest from January 24, 1921, the date of the filing of the cross-complaint. Judgment for the excess, in Philippine currency, will be rendered in favor of Atkins, Kroll & Co., as plaintiff in the cross-complaint, in an amount to be determined with reference to prevailing rates of exchange between the Philippine Islands and Singapore, after the return of this record to the lower court. No special pronouncement will be made as to costs of either instance. So ordered.

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

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