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THE FOOD PRESERVING & CANNING INDUSTRIES LTD., v. THE FAMAGUSTA NAVIGATION COMPANY

[WILSON, P., ZEKIA, VASSILIADES AND JOSEPHIDES, JJ.]

THE FOOD PRESERVING & CANNING INDUSTRIES LTD.,

Appellants-Plaintiffs,

v.

THE FAMAGUSTA NAVIGATION COMPANY,

Respondents-Defendants.

(*Civil Appeal No.* 4459).

Contract—Breach of contract—Bailment for reward—The Contract Law, Cap. 149, *sections* 107 et seq.—*Duty and degree of care owed by the bailee—Section* 109 *of Cap.* 149 (supra)—*English principles applicable—Onus on the bailee to explain how the damage to the goods stored occurred—And in the absence of evidence that the damage was not due to negligence, the bailee is liable—The fact that the bailor has had an opportunity to observe certain defects in the store-house is not in itself sufficient to bring him within the vexed maxim* " Volenti non fit injuria"—*Because from the very nature of the transaction the depositor of goods is entitled to rely upon the care and skill of the bailee.*

The appellants' plaintiffs' claim arises out of damage to their sugar while it was stored in the warehouse of the respondents (defendants). The storage was made by four consignments under four written agreements identical as to form in each case and the rate of storage charges. When the goods were removed from the warehouse of the respondents, part of them were found damaged. The damage was due to moisture but that is all that is known. As to why there was moisture the evidence was not helpful. It would seem that when they stored the said sugar the bailors' servants placed hessian cloth under the space covered by the goods stored.

Section 109 of the Contract Law, Cap. 149, reads as follows : " In all cases of bailment the bailee is found to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed".

The trial Court dismissed the action for damages brought by the bailors against the bailees. The High Court in allowing the appeal by the plaintiffs :—

Held, (1) the case in so far as liability is concerned turns on the conclusions to be drawn from the following facts: This is a simple case of bailment for reward. When the goods were

removed from the respondents' warehouse part of them were found damaged. The damage was due to moisture but that is all that is known. The appellants-plaintiffs inspected the premises before they stored the goods and they were then in good condition.

(2) The general law with respect to the position of the parties of course is governed by the Contract Law of Cyprus Cap. 149, section 107 et seq. Section 109 reads :—

> " In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."

(3) (*a*) The Law does not specifically deal with the question of whose responsibility it is to prove that the damage was not the result of negligence but it has been interpreted. We would refer to section 151 of the Indian Contract Act, by Pollock and Mulla, 6th edn,. p. 516 where the authors cite English precedents as being binding and apply the decision of the Privy Council in the case *Brabant and Co.* v. *King* (1895) A.C. 632. The principles applicable in that case would be equally applicable to the circumstances of this case.

(*b*) " Bailees for hire are under a legal obligation to exercise the same degree of care towards preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality ; and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred ". (Principles laid down by Lord Watson in *Brabant and Co.* v. *King ibid* on p. 641, *applied*).

(*c*) " It would be very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants, has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk or injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee. The authorities relating to the vexed maxim "Volenti non fit injuria" have no bearing whatever upon the point ". (Principles laid down by Lord Watson in *Brabant and Co.* v. *King* ibid on p. 641, *applied.*

(4) The fact that the plaintiffs inspected the goods and placed hessian cloth under the space covered by the goods stored makes no difference in the circumstances.

(5) It was for the defendants to explain how the damage occurred and, having failed to do so they must be held liable for such loss as the plaintiffs have sustained.

(6) Consequently the appeal will be allowed to the extent of setting aside the finding of the trial Judge that the plaintiffs were not entitled to recover damages and in its place there should be judgment declaring that the plaintiffs are entitled to damages for breach of contract, but dismissing the claim for the damages themselves.

Appeal allowed.

Cases referred to :—

Brabant and Co. v. *King* (1895) A.C. 632, at p. 640 per Lord Watson, *applied.*

Appeal.

Appeal against the judgment of the District Court of Famagusta (Orphanides D.J.) dated the 29.11.63 (Action No. 1628/60) dismissing plaintiffs claim for damage caused to sugar while it was stored in the warehouse of the defendants at Famagusta during 1958.

Char. D. Ioannides for the appellants.

G. Santis for the respondents.

The facts sufficiently appear in the judgment of the High Court.

WILSON, P. : This is an appeal from the judgment of the District Court of Famagusta on the 29th June, 1963, dismissing the plaintiffs' action with costs.

The plaintiffs' claim arises out of damage to sugar while it was stored in the warehouse of the defendants at Famagusta during 1958. There were four consignments : The first, consisting of 1023 bags was stored on February 11, 1958, the second, consisting of 1022 bags, on February 20, 1958, the third, consisting of 1020 bags, on February 22, 1958, and the 4th, consisting of 1023 bags, on June 19, 1958. The storage was made under written agreements identical as to form in each case, they were listed as exhibits 8 A, B, C, and D. The storage charges were to be paid at the rate of 10 mils and 9 mils per bag per

week. The plaintiffs were entitled and could withdraw, by paying the agreed storage rent, the whole or part of the quantity of sugar from the warehouse of the defendants at any time they wished.

The goods remained in the warehouse of the defendants for a considerable length of time and it was only when the last of them were withdrawn, on or about January 18, 1960, that it was discovered that some of the bags, which were last removed, had been damaged due to moisture.

The defendants' premises is a Custom bonded warehouse and the sugar was stored there under bond for the payment of the Customs duty.

There was a conflict in the evidence with regard to the number of bags damaged and the learned trial Judge, accepting the evidence given on behalf of the defendants, found the smaller number of 40 bags. With some considerable hesitation we have come to the conclusion that his decision in this respect must be accepted. There is evidence to support it and we cannot say that his assessment, on the witnesses' evidence, was wrong even if we have some doubts about the conclusion at which he arrived.

The case, therefore, in so far as liability is concerned, really turns on the conclusions to be drawn from the following facts :—This is a simple case of bailment for reward. When the goods were removed part of them were found damaged. The damage was due to moisture but that is all that is known. The plaintiffs inspected the premises before they stored the goods and they were then in good condition. As to why there was moisture the evidence is not helpful. These facts are established by the evidence given on behalf of the plaintiffs and on behalf of the defendants.

The general law with respect to the position of the parties of course is governed by the Contract Law of Cyprus, Cap. 149, section 107 *et seq*. Section 109 reads :

> " In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."

The Law does not specifically deal with the question of whose responsibility it is to prove that the damage was not the result of negligence but it has been interpreted. We would refer to section 151 of the Indian Contract Act, by Pollock & Mulla, 6th Edn., p. 516 where the authors cite English precedents as being binding and apply the decision of the Privy Council in the case of *Brabant* & *Co.* v. *King*, 1895 Appeal Cases, p. 632. In that case the Government was a bailee for hire. It stored the appellants' explosive goods in sheds near to the water-edge and subsequently the goods were damaged as a result of flooding. The principles applicable in that case would be equally applicable to the circumstances of this case except that the facts in that case were more strongly against the warehouseman or bailee than they were here.

At p. 640 Lord Watson, delivering the judgment of the Court says this :

> " Their Lordships can see no reason to doubt that the relation in which the Government stood to the appellant company was simply that of bailees for hire. They were therefore under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred."

At page 641 he continues :

> " It would be very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants, has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee. The authorities relating to the vexed maxim " Volenti non fit injuria " have no bearing whatever upon the point. From the very nature of the transaction the depositor is entitled to rely upon the care and skill of the bailee. The duty is incumbent upon the latter, in the due fulfilment of his contract, of consider-

ing whether his premises can be safely used for the storage of explosives or other goods, and, if they cannot, to take immediate steps for placing the goods in a position of safety. If the defects of these Government magazines were as apparent to the servants of the appellant company as the jury have found they were, they ought to have been equally patent to the official storekeeper, with whom the duty of safe custody rested."

The defendants contend that in this case the plaintiffs' employees inspected the goods and when they stored the sugar they placed hessian cloth under the space covered by the goods stored ; that this in itself indicates the measure of care which had to be exercised by the plaintiffs in storing the bags of sugar when they were to be placed on a cement floor. It is our view that this makes no difference in the circumstances. It was for the defendants to explain how the damage occurred and, having failed to do so they must be held liable for such loss as the plaintiffs have sustained.

When we come to the damages we point out that the learned trial Judge failed to assess them as, it has been pointed out time and again, he ought to have done. However, all the evidence, which the parties desired to adduce on this issue, was in fact placed before the Court and it is our responsibility to assess them. Based upon the evidence accepted by the learned trial Judge we find, for the reasons which have already been given, that the loss was 40 bags ; we think we are justified in taking this figure, one said 30–40 and another estimated the damaged bags at 40. At £7 per bag this makes a total loss of £280. The plaintiffs contend that from the damaged bags they recovered £320. The evidence is not sufficiently satisfactory to say whether we should take only 40 bags as destroyed, but the burden of establishing the loss is on the plaintiffs and they failed to prove more than we have assessed.

Consequently the appeal will be allowed to the extent of setting aside the finding of the trial Judge that the plaintiffs were not entitled to recover damages and in its place there should be judgment declaring that the plaintiffs are entitled to damages for breach of contract but dismissing the claim for the damages themselves.

As to costs, each party will bear its own costs both here and at the trial.

Appeal allowed to the extent as aforesaid.