1968
Oct. 11

TRANSAGRAIRE (PORTUGAL) LIMITADA RUAD DE COMERCIO v. BELLAPAIS FARM LIMITED

[JOSEPHIDES, LOIZOU, HADJIANASTASSIOU, JJ.]

TRANSAGRAIRE (PORTUGAL) LIMITADA, RUAD DE COMERCIO,

Appellants-Defendants,

v.

BELLAPAIS FARM LIMITED,

Respondents-Plaintiffs.

(Civil Appeal No. 4681).

Contract—Breach of—Sale of goods—C.i.f. contract—Delivery of unmenchantable goods—Findings of fact—Inferences drawn from such facts—Trial Court justified in making the findings they made and in drawing therefrom the inferences they did draw.

Appeal—Findings of fact—Inferences drawn therefrom—See above.

Findings of fact and inferences drawn therefrom—See above.

Sale of goods—C.i.f. contract—Unmerchantable goods—See above.

This is an appeal by the defendants-sellers from the judgment of the District Court of Kyrenia whereby the plaintiffs-buyers were awarded the sum of £1,299 as damages for breach of contract, which was a c.i.f. contract for the sale of 100 metric tons of Angola machine dried fish-meal. The main argument in this appeal was that the respondents-plaintiffs failed to prove that the goods were unmerchantable at the time of the loading.

Held, the appellants-defendants did not adduce any evidence whatsoever; they failed to produce the original bill of lading from Angola; and they failed to produce the veterinary certificate as expressly required in their contract. In the absence of that evidence, we are of the view that the trial Court were amply justified in making the findings of fact which they made and in drawing the inferences which they did draw from such facts. Indeed, we would even go further and say that we would be surprised if they had reached any other conclusion in the circumstances of the present case.

Appeal dismissed with costs.

Appeal.

Appeal by defendants against the judgment of the District Court of Kyrenia (Loizou P.D.C. & Savvides, D.J.) dated the 27th October, 1967, (Action No. 130/65) whereby the plaintiffs were awarded the sum of £1,299.195 mils as damages for breach of contract.

C. Myrianthis, for the appellants.

A. S. Christophides, for the respondents.

The judgment of the Court was delivered by:

JOSEPHIDES, J.: This is an appeal by the defendants from the judgment of the District Court of Kyrenia whereby the plaintiffs were awarded the sum of £1,299.195 mils as damages for breach of contract.

This was a C.i.f. contract for the sale of 100 metric tons of Angola machine dried fish-meal. The trial court awarded damages under three heads, but we are only concerned with the damages awarded in respect of 16,543 kilos of unmerchantable goods amounting to £925.458 mils. Originally the defendants challenged also the other part of the judgment in respect of short landed goods etc., amounting to £373.737 mils, but in the course of the hearing before us this part of the appeal was abandoned.

The main argument before us today was that the respondents-plaintiffs failed to prove that the goods were unmerchantable at the time of the loading.

The contract was negotiated by the plaintiffs and the defendants through the latter's agents in Cyprus. According to the terms of the contract the price payable was £56.5.0d per metric ton "c.i.f. Famagusta, gross for net delivered weight. Weight to be certified at delivering time". Payment terms were "100% net cash by Letter of Credit opened in our name in a Bank in Lisbon". The amount agreed upon was payable, *inter alia*, against "commercial invoice, shipping documents to order blank endorsed, certificate of origin and quality and veterinary certificate". The veterinary certificate was, according to the contract, an analysis of the goods by the Official of the Angola Veterinary Services. In fact, this veterinary certificate was never produced by the defendants either at the time of the delivery of the goods

or in the course of the hearing of this case. In compliance with the contract the plaintiffs, through their bankers, issued a letter of credit in favour of the defendants. The goods were shipped from Angola and subsequently trans-shipped at Lisbon. No bill of lading regarding the loading of the goods at Angola was produced by the defendants-appellants. The bill of lading in respect of the trans-shipment of the goods at Lisbon was an unclean bill stating "packing of bad condition. Many bags torn, losing contents". The goods arrived in Famagusta and they were taken delivery of by the plaintiffs. The documents, but without the veterinary certificate, arrived a few days later.

The plaintiffs complained that the agreed quantity of goods was not delivered and that there was a quantity of 9,237 kilos short-landed. They also complained that of the goods delivered 16,543 kilos were of unmerchantable quality.

The defendants defended the case on several grounds but we are now only concerned with the quality of the goods delivered. The trial court, after hearing seven witnesses called by the plaintiffs, and no evidence at all by the defendants, delivered a very careful and elaborate judgment, analysing all the evidence and giving full reasons for their findings of fact and inferences from such facts.

With regard to the bad condition of the cargo on arrival, the trial court stated in their judgment that they had the evidence of the surveyor for Lloyds agent, Andreas Loizou, and the contents of the survey report, which had been put in evidence by consent. Regarding the bad quality of part of the fish-meal, there was the evidence of Dr. Rudolf Goldstein, Euripides Angastiniotis and the expert opinion of Georgios Hji Pieris based on the analysis report. Hji Pieris is a Bachelor of Agricultural Science of the Melbourne University and Ph.D. in Animal Nutrition of the London University. With regard to the lumpy and unmerchantable part of the goods there was the evidence of the employees of the "Surveillance", Avgoustis Tornaritis who carried out the survey and separated the lumpy stuff from the rest, and that of Andreas Pavlides who carried out the sampling, and according to such evidence the quantity of the lumpy stuff, of which sampling and analysis was made, amounted to 16,453 kilos.

On that evidence the trial court was satisfied that the aforesaid quantity arrived in Famagusta in a lumpy, mouldy

condition and affected to such an extent as to be unmerchantable and potentially dangerous to use. The trial court considered the allegation of the defendants' counsel that the goods might have been affected whilst at the plaintiffs' store and they came to the conclusion that this allegation was not supported by evidence, but that, on the contrary, from the evidence of the expert Dr. Hji Pieris, such probability was excluded.

According to the evidence of this witness "this condition (of decomposition) would not have developed in less than three months before the sample was taken". He was further of opinion that the moisture in the sample was very low and for goods to have reached such a state of decomposition due to moisture in the store they should have been lying in the store for one or one and a half years.

As the trial court stated in their judgment, in the absence of any evidence to the contrary they accepted the plaintiffs' version that the decomposition of the goods could not have resulted due to storing in the plaintiffs' stores, and they found as a fact that the goods were in such condition when they arrived in Famagusta. The trial court also referred to the bad condition of the packing as described in the bill of lading at the time of trans-shipment in Lisbon.

Another argument of the defendants which was considered by the trial court was that the goods were affected after shipment and in the course of transportation or trans-shipment. The court was of opinion that there was no evidence before the court to substantiate such submission and they referred to the defendants' failure to provide or adduce in evidence the bill of lading in respect of the goods shipped at Angola, and to their failure to provide the plaintiffs with a veterinary analysis of the goods at the port of shipment. The court further noted the absence of the evidence on behalf of the defendants regarding the quantity and quality of the goods which were in fact shipped at Angola. "The only inference", said the trial court, "we can draw from the evidence before us is that the bad quality of part of the goods existed before shipment and that the quantity shortlanded at Famagusta was not shipped at the original port of shipment. The defendants failed to adduce any evidence to establish their allegation that they have complied with their contract and shipped goods of the quality and quantity sold by them to plaintiffs".

In consequence the trial court found that there was a breach of contract by the defendants.

That finding was challenged before us by learned counsel for the appellants. While accepting the findings of primary facts as made by the trial court, he submitted that the inferences drawn by the court from those facts were not reasonable or open to the court on the evidence. In making that submission counsel stated that nine-tenths of the goods were unaffected by mould; that it was suspicious that the results of the analyses by the Cyprus Government laboratory and the Israeli laboratory were not adduced in evidence; that one could not exclude the possibility that the damage to the goods was caused in the plaintiffs' store; and that the damaged goods (the mouldy fish-meal) were found only in the loose quantity and not in the bags which were intact.

As we had occasion to point out in the course of the argument of this appeal, argument by learned counsel can never substitute the evidence which is necessary to support a case. The appellants-defendants did not adduce any evidence whatsoever; they failed to produce the original bill of lading from Angola; and they failed to produce the veterinary certificate as expressly provided in their contract. In the absence of that evidence, we are of the view that the trial court were amply justified in making the findings of fact which they made and in drawing the inferences which they did draw from such facts. Indeed, we would even go further and say that we would be surprised if they had reached any other conclusion in the circumstances of the present case.

In the result the appeal is dismissed with costs.

Appeal dismissed with costs.