A

JANARDHAN PRASAD AND OTHERS

v.

GOVIND SINGH AND OTHERS

[SUPREME COURT, 1967 (Mills-Owens C.J.), 20th September, 12th October] B

Appellate Jurisdiction

Damages—mitigation—duty to mitigate—delay in selling defective winch—concurrence in delay by party liable for damages—Magistrates' Courts Rules (Cap. 5) 0.36 r.19.

Contract—agency—breach of contractual duty by agent—liability in damages—duty of successful party to mitigate—concurrence by both parties in course of action resulting in failure to mitigate—Magistrates' Courts Rules (Cap. 5) 0.36 r.19. C

The appellants, acting as agents for the respondents, ordered a winch from suppliers in England, but in doing so were in breach of their duty to the respondents, in failing to specify that the winch had to be suitable for hauling heavy logs. The winch, the price paid by the respondents for which was £292-7-6, proved unsuitable for this purpose and in the Magistrate's Court the appellants were held liable to the respondents for the loss, and damages were awarded against them in the sum of £200. No action was taken to sell the winch for some six years and there was no evidence whether it was finally sold or was dumped. During this period the respondents, with the assistance and concurrence of the appellants, had sued the English suppliers but were unsuccessful. D

Held: 1. The onus of mitigating their damages was on the respondents. E

2. Nevertheless one head of the claim in the action against the suppliers was based on refusal to accept delivery and as in bringing the action the appellants and the respondents were acting in concert it could not be laid solely at the respondents' door that an earlier attempt to mitigate was not made.

3. There was uncontradicted evidence that it was at the request of the appellants that the winch was retained pending the outcome of the action against the suppliers. F

4. Both parties were to blame in the matter of mitigation and the magistrate's award of damages was in the circumstances reasonable.

Cases referred to: *Gokal Chand — Jagan Nath v. Nand Ram Das — Atma Ram* [1939] A.C. 106; [1938] 4 All E.R. 407: *Weld-Blundell v. Stephens* [1920] A.C. 956; 123 L.T. 593: *Cassaboglou v. Gibb* (1883) 11 Q.B.D. 797; 48 L.T. 850. G

Appeal against a judgment in the Magistrate's Court awarding damages for breach of a contract of agency. The judgment is reported only on the question of mitigation of damages, the relevant facts being set out in the judgment.

H

A. M. Koya for the appellants.

F. M. K. Sherani for the respondents.

MILLS-OWENS C.J.: [12th October, 1967]—

The learned Magistrate gave judgment against the appellants in the following terms —

" This was an action in which the plaintiff claimed £292.7.6 from defendant, being loss suffered by plaintiff in connection with the purchase of a winch.

The plaintiffs are a firm of saw-millers at Nausori: the defendants are a firm of manufacturers representatives. It is agreed that the plaintiff through the defendant ordered a winch from an English Company, suitable for a 1958 D4 Caterpillar tractor. The winch when it arrived proved quite unsuitable for the plaintiff's purposes which included the hauling of heavy logs. The plaintiff is now saying this was the fault of defendant.

There was a previous action in the Supreme Court by the present plaintiff against the English exporting company; but the claim was dismissed. According to his verbal evidence, this claim was made in consultation with the present defendant, who supplied copies of the various documents. A file of correspondence, that was an exhibit in the Supreme Court hearing, was tendered by consent; this included a copy of the original order from the defendant to the English Company: and letters from defendant to the said company dated 20th and 23rd May, 1960, 16th June, and 7th July, 1960.

Incidentally the contract in question in this case is undoubtedly the contract of agency between plaintiff and defendant, and the question in issue is whether the defendants are in breach of that contract. The offer of the overseas company was accepted on 13th June, 1960, and the writ was issued on 8th June, 1966: the question of lapse by reason of the Limitation Act was not mentioned, however, in argument.

The insurance certificate and a copy of the Supreme Court Writ of Summons were also produced.

A partner of the plaintiff firm gave evidence, and the sole witness for the defendant was a bank officer from the Bank who issued the letter of credit on behalf of the plaintiff: thus the plaintiff's evidence so far as it is reasonable and is uncontradicted and has not doubt cast upon it by cross-examination must be accepted.

The plaintiff gave evidence that he had dealt with the defendant for 2 years previous to this order: that they knew he was a saw-miller: he said he had discussed the problem with them, and they knew he required a winch suitable for loading heavy logs. He said he had paid the English Company the sum of £292.7.6. and that he had not been acquainted with the correspondence passing between the defendant and the English Company. The only part of the transaction in which he took part was to arrange for the Letter of Credit for sending to London, through the Bank.

In cross-examination he refused to admit he had seen the order sent by the defendants: this describes a winch suitable for the tractor, but makes no mention of it having to be suitable for hauling heavy logs. The first mention of this was in the letter by defendants to English Company on 4th July, 1960, and the contract had been concluded by 13th June, 1960.

The plaintiff admitted his evidence given in the Supreme Court, but it does not greatly help the defendants.

It is the duty of an agent to obey his instructions, and to exercise reasonable diligence and skill in the performance of his duties — *Gokal Chand — Jagan Nath v. Nand Ram Das — Atma Ram* [1938] 4 All E.R. 407. If the instructions are express, the agent must follow them exactly, though if ambiguous, he may act reasonably.

Here the defendants knew of the plaintiff's occupation: plaintiff says, and it is not contradicted, that he discussed it with the defendants and told them he needed a winch for hauling heavy logs. I consider his evidence was not sufficiently shaken in cross-examination, and that he has proved his case on the balance of probabilities, and that defendants were in breach of their duty in not stipulating in their order that the winch had also to be suitable for hauling heavy logs.

The defendants accordingly have to pay damages for the loss. *Weld-Blundell v. Stephens* [1920] A.C. 956.

The duty to mitigate damages applies to contracts of agency as well as other contracts.

It is now 6 years since the winch was ordered. Plaintiff took no steps to sell the unsuitable winch, on, as he says the instructions of his agents, the defendants. Consequently the loss was greater than need be. For instance, a sum of £90 was paid as Customs dues; the winch was auctioned but no mention was made of the price.

I do not know at what figure the winch would have been sold at once in 1960; it may well have been more than £90: it is an arbitrary figure, but in default of any evidence, I consider it approximates to justice; I therefore intend to make the defendants an allowance of £92.7.6, due to the plaintiff's failure to mitigate his damages, and give judgment for the plaintiff for £200 and costs.

Cost to be taxed if not agreed within 14 days."

The appellants appeal on two main points. First, on the issue of liability, it is contended that as the respondents' witness had said that he had specified in the letter of credit that the payment was to be for a winch for heavy duty logging he had thereby assumed responsibility for the order. In fact the appellants' only witness, the Bank Officer, was unable to produce the letter of credit or to state whether it contained any such reference. I do not think it would have mattered if in fact it did refer to a winch suitable for heavy duty logging. The order was the material document and that had been drawn up and dated the day before the letter of credit was requisitioned by the respondents. There is no acceptable evidence that the letter of credit formed any part of the contract with the suppliers. The order was in specific terms — for a specific make and type of winch, with no reference to its suitability for heavy logging duty. Clearly, once the evidence for the respondents was accepted, there was a clear case of breach of duty on the part of the appellants and they were liable to make good to the respondents any loss directly consequent on their failure to carry out their instructions (*Cassaboglou v. Gibb* (1883 11 Q.B.D. 797). Accordingly, in my view, this ground of appeal fails.

Secondly, it is contended that the respondents, being under a duty to mitigate their damages, ought as soon as possible to have put up the winch for sale; it is only reasonable to assume if they had done so that a price not much below its cost would have been obtained. But the position

was not, I think, as simple as that. There was an attempt by the respondents to recover by action in the Supreme Court from the suppliers of the winch; the appellants concurred and assisted the respondents in those proceedings. If the respondents had sold the winch they would have lost all right to recover on their first head of claim in the Supreme Court which was based on rescission, rightful refusal to accept delivery of the winch, and for recovery of the price paid as for a consideration which had failed. Sale of the winch would not have affected their second, and alternative, head of claim, namely for damages, but the two parties the appellants and respondents, were obviously acting in concert and it cannot be laid solely at the respondents' door that an earlier attempt to mitigate the loss was not made. First they were trying to fix liability on the suppliers. Moreover, the evidence of the respondents was that it was at the request of the appellants that the winch was retained pending the outcome of the Supreme Court proceedings, and there was no evidence to the contrary. The respondents could hardly be blamed for accepting the appellants' advice in the matter, especially as in the earlier stages, according to the evidence, they told the respondents that they were in touch with the suppliers and would arrange for repayment. According to the uncontradicted evidence for the respondents they were unaware of what ultimately happened to the winch, whether it was sold or dumped. No evidence was forthcoming from the appellants on this point at the trial, and no attempt has been made to seek leave to introduce evidence on this appeal.

As it appears to me, by bringing proceedings in their own names against the suppliers the respondents have conceded that they were brought into a direct contractual relationship with the suppliers. That would not, of course, have affected the appellants' liability to them for breach of the agency agreement between them. But it thrust the onus of mitigation on the respondents, as the winch became theirs to dispose of, at least when the result of the litigation with the suppliers became known. But any additional loss due to the failure to dispose of the winch earlier cannot, in my view, properly be held to fall solely on the respondents because the uncontradicted evidence is that the litigation with the suppliers was a joint enterprise and because the appellants, on the evidence, requested that it should not be sold. Again, according to the uncontradicted evidence the respondents have had no benefit from their expenditure of £292.7.6 at all; they know nothing of what happened to the winch. Mr. Sherani contended that in those circumstances they ought to have their damages increased to the amount of the price paid for the winch, namely £292.7.6. On it being pointed out to him that there was no cross-appeal, he contended that it was nevertheless open to the Court on the appeal to increase the damages by reason of the provisions of Order XXXVI r.19 of the Magistrates' Courts Rules. Technically I suppose it is, but hardly would the power be exercised in a case such as this where the appellants have obviously been taken by surprise and would in the event of a cross-appeal at least have had the opportunity of adducing evidence as to the disposal of the winch. In the circumstances as it appears to me both parties were to blame in the matter of mitigation. The respondents must bear some responsibility. The learned Magistrate appears to have taken a reasonable way out of the difficulty arising from the lack of evidence as to its disposal. Accordingly I hold that this ground of appeal also fails.

The appeal is dismissed, with costs.

Appeal dismissed.