25, 1954

No. 30 of 1953.

Privy Council.

37663

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

BETWEEN

HOLLAND COLOMBO TRADING SOCIETY LTD.
(Plaintiff) . . . *Appellant*

AND

1. SEGU MOHAMED KHAJA ALAWDEEN,
2. MOHAMED OWDHU,
3. MOHAMED LEBBE MARIKAR,
4. SEGU MOHAMED BUHARI.

All carrying on business in partnership under the name, style and firm of "S. S. K. HAJA ALAWDEEN & SONS" (Defendants) *Respondents.*

CASE FOR THE RESPONDENTS.

RECORD.

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated 18th August, 1952, setting aside a Judgment and Decree of the District Court of Colombo, dated the 7th December, 1949, in an action instituted by the Appellant against the Respondents for the recovery of a sum of Rs.13,697.06 as damages for breach of contract together with interest and costs. p. 46. p. 55. p. 37. p. 43.

By its said Judgment and Decree the Supreme Court ordered the dismissal of the Appellant's action as prayed for with costs to the Respondents in both Courts. p. 55.

2. The question for determination in this Appeal is whether the Appellant was entitled to damages from the Respondents for breach of an alleged contract for the sale of a quantity of textiles.

3. The Appellant is a Company with limited liability duly incorporated under the English Companies Act of 1929 and carries on business in Ceylon with a registered office in Colombo. Its business was registered in Ceylon under the Companies Ordinance. p. 7. p. 14, ll. 20-35. p. 62.

The Respondents are a firm carrying on business under the name, style and firm of S. S. K. Haja Alawdeen & Sons.

4. The alleged contract is contained in a document, P.8, dated 5th September, 1947, and a letter, P.9, dated 25th September, 1947. p. 63 to p. 68.

P. 9–p. 69. P.8 is a lengthy document signed by the Respondents and addressed the Appellant. It consists of a part headed "Description of Goods" and a number of conditions contained in the form of a letter. In the p. 63, ll. 1–10. part of the document headed "Description of Goods" the following appears :—

"Commodity : 300 pieces 42 inches × about 40 yards White "Shirtings (Dutch) 'Lucinde.'

"Price : 40d. per yard c.i.f. Colombo.

"Payment : Cash against documents.

"Shipment : October/in one lot, January, 1948."

The letter part of the document contains *inter alia* the following :—

p. 63, ll. 21–31. "I/We the undersigned of Messrs. S. S. K. Hadji Alawdeen "& Sons, 99 Second Cross Street, Colombo, hereby request you "to order and import for me/us on my/our account and risk the "whole or any part of the goods described in the reverse hereof, "on the following terms, and I/we agree to take delivery of the "goods, or of such part as may be delivered from the vessel or "vessels, on arrival and to pay you the price mentioned together "with your commission of per cent. and all freight, dues, "customs duties, landing, warehouse and other customary charges.

p. 64, ll. 1–4. "1. Payment to be made in cash on or before arrival of the "goods and I/we shall not be entitled to call for or await tender "before payment; . . . Any tender or delivery of the goods or "of the bill of lading or of such delivery order or other document "or documents as will enable me/us to obtain possession of the "goods shall in every case constitute a valid tender or delivery.

* * * * *

p. 64, ll. 31–35. "4. The goods to be insured against loss and such risks as "you may think best for my/our interest and I/we undertake to "pay the premiums in respect of such insurance. I/We further "agree to bear all loss or damage to the goods which is not "recoverable under such insurance. You or your agents or the "manufacturers or suppliers of the goods are at liberty to effect "the insurance in any manner which you or they may desire "including insurance under a policy covering other goods not "belonging to me/us and insurance under a floating policy. "Notwithstanding that the price of the goods may be expressed "to be fixed on c.i.f. or equivalent terms, I/we shall not be entitled "to demand nor shall you be bound to tender or deliver to me/us "any insurance policy, bill of lading, invoice or other document or "documents whatsoever but any such tender or delivery as "described in clause 1 hereof shall be good and valid tender or "delivery. In the event of my/our suffering loss recoverable from "the insurer, you shall be at liberty either to deliver to me/us a "policy under which the goods are insured or to claim the amount "of the loss from the insurer on my/our behalf.

* * * * *

4. The expression ' bill of lading ' herein shall include any document issued as or purporting to be a bill of lading containing an acknowledgment by the ship owners or their agents of the receipt of the goods whether on board the ship or for shipment or " otherwise and whether alone or with other goods." p. 65, ll. 27 to 30.

5. By P.9 the Appellant confirmed that the terms of the document P.8 had been accepted and booked by its principals. p. 69, ll. 11–20.

6. In January, 1948, the Appellant informed the Respondents that the goods were being shipped that month. The Respondents stated in reply that unless the goods arrived in Colombo by 31st January, 1948, they would not accept them. The Appellant insisted that it was entitled to ship up to the end of January. P.10, pp. 69–70. P.11, p. 70. P.12, p. 71.

7. On or about 29th January, 1948, the Appellant put on board the s.s. " Laurenskerk " at Rotterdam for shipment to Colombo 6 bales totalling 291 pieces of the description set out in P.8, under a contract of affreightment the terms of which are contained in a bill of lading P.19. P.15, pp. 82–83. p. 24, ll. 14–21. P.20, p. 83. p. 63–p. 68. p. 73–p. 81.

8. By letter dated 26th February, 1946, P.16, the Appellant advised the Respondents that it had received from its London office the " documents " relating to the shipment with instructions to present them for payment. The Appellant enclosed its Invoice No. 13,096 for Rs.25,742.72, asked for the Respondents' " cheque by return to enable us " to hand you the necessary documents," and stated that it understood that the carrying ship was expected to arrive on or about 20th February, 1948. The Respondents returned the invoices on 28th February, 1948, referring to their previous letter, P.13, of 17th January, 1948. p. 84. p. 24, ll. 21–35. D.1, p. 81–82. P.17, p. 84. p. 71–72.

9. Instead of arriving as expected towards the end of February, 1948, the goods did not arrive till the beginning of April, 1948, the delay being apparently due to an accident to the s.s. " Laurenskerk " necessitating their transhipment at Genoa to another ship s.s. " Triport." There is no evidence as to the terms arranged between s.s. " Laurenskerk " and s.s. " Triport " in respect of the carriage of the goods by the latter vessel. p. 25, ll. 25–27. p. 39, ll. 39–41. p. 40, ll. 31–34. p. 22, ll. 15–24.

10. Two interviews took place between the parties, one before and one after the arrival of the goods, at which or at one of which, the Appellant showed certain documents to the Respondents. What the documents were is not quite clear but it is not in question that no policy of insurance was shown and that the only bill of lading shown was the original one, P.19. No bill of lading or other shipping document relating specifically to the carriage of the goods in the s.s. " Triport " or emanating from that ship was ever tendered. No evidence was led that the documents tendered were valid and effective at the time of tender or would have enabled the goods to be collected. p. 16, ll. 21–28. p. 25, ll. 26–34.

11. The Respondent not having paid the amount of the Invoice, namely, Rs.25,742.72, the goods were in due course sold by public auction on the Appellant's instructions and after allowing for Customs and other p. 17, ll. 4–11. p. 12, ll. 4–7. pp. 89–90. p. 40, ll. 1–8.

pp. 12-14. charges and expenses realised a nett sum of Rs.12,045.66. The differ[redacted] between this sum and the amount of the Invoice, that is, Rs.13,697.06, is the sum claimed by the Appellant in this action.

pp. 6–7. 12. On the 6th of October, 1948, the Appellant commenced

THE PRESENT SUIT.

In its Plaint the Appellant alleged that the Respondents had agreed to accept the said goods and to pay for them by cash against documents and that they had wrongfully and unlawfully failed and refused to accept the said goods in the month of February, 1948, and/or pay for them at any time in accordance with the terms of the said contract of sale, and that by reason of the breach it had suffered loss and damage in the sum of Rs.13,697.06. The documents the Appellant stated it relied on were, in addition to P.8 and the correspondence, "Invoices and Bill of Lading."

pp. 63–68. p. 83. p. 73–81.

pp. 8–9. p. 8, ll. 28–31. p. 9, ll. 1–10. 13. By their Answer the Respondents *inter alia* put in issue the material averments in the Plaint and pleaded that the alleged contract was unenforceable and that they were entitled to refuse to accept the goods offered to them in April, 1948.

14. The issues framed in the suit and the answers given by the learned District Judge were as follows:—

p. 9, ll. 19–21. "(1) Did the Plaintiff Company on or about 5.9.47 agree to "sell or sell to the Defendants, and did the Defendants agree to "buy or buy from the Plaintiff Company 300 pieces of white "shirting (Dutch) called Lucinde, description and price of which "are given in paragraph 4 of the Plaint?"

p. 42, ll. 21. Answer: "Yes."

p. 9, ll. 23–24. "(2) Did the Defendants agree to accept the said goods and "to pay the price thereof by cash against documents?"

p. 42, l. 22. Answer: "Yes."

p. 9, ll. 24–26. "(3) Did the Defendants fail and refuse to accept the said goods or to pay for them by cash against documents?"

p. 42, l. 23. Answer: "Yes."

p. 10, ll. 2–5. This issue was allowed by the learned District Judge despite objection by the Respondents that an issue in this form was not covered by the pleadings.

p. 9, ll. 26–28. "(4) If issues 1, 2, 3 or any of them is answered in the "affirmative, has the Plaintiff Company suffered loss and damage?"

p. 42, l. 24. Answer: "Yes."

p. 10, l. 1. "(5) If so, what damages is the Plaintiff Company entitled "to?"

p. 42, l. 25. Answer: "Rs.13,697.06."

p. 10, ll. 6–7. "(6) Does the agreement pleaded in paragraph 4 of the Plaint "satisfy the requirements of Section 5 of the Sale of Goods "Ordinance?"

p. 42, l. 26. Answer: "Yes."

"(7) If not, is the alleged contract unenforceable in law ?" p. 10, l. 8.

Answer: "Does not arise in view of my answer to issue 6." p. 42, l. 27.

"(8) Does the Plaint disclose a cause of action against the "Defendants ?" p. 10, l. 9.

Answer: "Yes." p. 42, l. 28.

"(9) If not, can Plaintiff Company maintain this action ?" p. 10, l. 10.

Answer: "Does not arise in view of my answer to issue 8." p. 42, l. 29.

"(10) Did the Plaintiff Company in April, 1948, intimate that "a part of the goods had arrived ?" p. 10, ll. 11–12.

Answer: "Plaintiff Company intimated that all the goods "had arrived." p. 42, l. 30.

"(11) Did the Defendants refuse to accept the said goods ?" p. 10, l. 13.

Answer: "Yes." p. 42, l. 31.

"(12) Were the Defendants justified in refusing to accept the "said goods ?" p. 10, l. 14.

Answer: "No." p. 42, l. 32.

15. At the hearing of the suit, which took place on the 22nd September, 6th and 13th October, 1949, oral evidence was led on both sides. At the close of the arguments judgment was reserved. pp. 9–37.

16. By his Judgment, dated 7th December, 1949, the learned District Judge gave Judgment for the Appellant for the sum of Rs.13,697.06 together with legal interest from date of the Plaint until payment, and costs. pp. 37–42.

17. The learned District Judge found there was a binding contract of sale between the parties which the Respondents had repudiated by their letter of 15th January, 1948, P.11, "so that from 15th January, "1948, the Defendants had consistently taken up the position that they "had repudiated the contract because the goods did not arrive in Ceylon "before 31st January, 1948, which was undoubtedly the result of their "misunderstanding of the stipulations contained in the contract of sale." p. 63. p. 38, ll. 15–23. p. 70. p. 41, ll. 39–45. p. 39, ll. 1–4.

18. The learned District Judge was of opinion that the Appellant was not a commission agent "because Plaintiff agreed to sell the goods "at a fixed price." As to the discrepancy in number between the 300 pieces in P.8 and the 291 pieces shipped, the learned Judge held that the Respondents at no stage repudiated the contract on the ground of shortage and that in any event clause 12 of P.8 would operate so as to preclude the Respondents from rejecting on this ground. p. 40, ll. 10–31. p. 65, ll. 31–34. p. 66, ll. 1–3.

19. On the question of transhipment the learned District Judge considered only clause 16 of the Bill of Lading, P.19, which clause, it is submitted, goes no further than authorising the Master of the s.s. "Laurenskerk" to tranship. p. 40, ll. 31–39.

p. 41, ll. 10–15. 20. As to the point taken by the Respondents that no policy of Insurance was tendered by the Appellant to them, the learned Judge found this to be a fact, but dismissed the objection stating :—

> " It was never the case for the Defendants that they refused " to take delivery of the goods and pay for the same because the " Plaintiff had failed to tender to the Defendants a policy of " insurance covering the goods ordered. That point was not " specifically taken in the answer and no specific issue was " raised."

p. 43. p. 44, ll. 31–35. p. 45, ll. 1–4. p. 45, ll. 17–20. 21. A Decree in accordance with the Judgment of the learned District Judge was entered on 7th December, 1949, and against the said Judgment and Decree the Respondents appealed to the Supreme Court of Ceylon. The main grounds of appeal were that there was no Contract of Sale entitling the Appellant to maintain this suit, that there had not been a proper tender of the shipping documents, including a policy of insurance, and that the Respondents were entitled to reject the goods.

pp. 46–55. 22. By their Judgment dated 18th August, 1952, the learned Judges of the Supreme Court before whom the Appeal came (Gratiaen and Gunasekera, JJ.) set aside the said Judgment and Decree of the District Court and ordered Judgment to be entered in favour of the Respondents and dismissed the Appellant's action with costs in both Courts.

23. Delivering the main Judgment of the Court, Gratiaen, J. (with whom Gunasekara, J., agreed) stated :—

p. 46, ll. 15–19. " The offer contained in P.8 was in due course accepted by the " Plaintiffs on 25th September, 1947, and in the result there came into " existence a binding contract of sale between the Plaintiffs (as " sellers) and the Defendants (as buyers) upon, *inter alia*, the " terms and conditions set out in the document P.8."

* * * * *

p. 46, ll. 30–39. " Payment was expressed to be ' cash against documents,' " the meaning of which expression has been explained and qualified " in clauses (1) and (4) of P.8, namely that ' payment was to be made " ' in cash on or before arrival of the goods,' and that the buyers " were ' not entitled to call for or await tender (of the goods) " ' before payment ' ; and that ' any tender or delivery of the goods " ' *or* of the Bill of Lading *or* of such delivery order or other " ' document or documents as will enable the buyers to obtain " ' possession of the goods shall constitute a valid tender or " ' delivery.' "

24. The learned Judge went on to say :—

p. 47, ll. 31–36. " . . . the Plaintiffs could at their option have performed their
p. 48, ll. 1–4. " obligations as to delivery under the contract in one or other of the " alternative methods available to them. For instance—

> " (A) they could have cleared the goods themselves upon their " arrival in the port of Colombo and then made valid tender of " them to the defendants . "

" *or*

" (B) they could after the goods had been shipped at the foreign p. 47, l. 41. p. 48, l. 15.
" port in terms of the contract, have made a tender to the
" Defendants either of a valid and effectual bill of lading, duly
" indorsed, or, if they so preferred, of any other document entitling
" the Defendants to obtain possession of the goods on their arrival
" in the port of Colombo *from the particular vessel in which they did*
" *arrive* . . .

" . On 29th January, 1948, within the period stipulated in
" the contract, the Plaintiff did in fact cause the goods to be placed
" on board the steamer s.s. ' Laurenskerk ' at the port of Rotterdam
" for shipment to Colombo under a contract of affreightment with
" the owners of that vessel the terms and conditions of which are
" set out in the Bill of Lading P.19."

25. The learned Judge said that the Appellant's offer to deliver the p. 49, ll. 2–7.
Bill of Lading, P.19, duly indorsed to the Respondents upon payment of the price constituted at that time (that is, in February, 1948) a valid tender within the meaning of the contract, and that by the Respondents' refusal of payment, they (the Respondents) had wrongfully repudiated the contract and incurred an immediate liability at the option of the Plaintiff to be sued for damages arising from its breach.

26. Continuing, the learned Judge said :—

" It is clear, however, from the oral evidence and from p. 49, ll. 8–20.
" subsequent correspondence between the parties, that the Plaintiffs
" elected not to treat the contract as immediately discharged but
" preferred instead, as they were certainly entitled to do, to regard
" it as subsisting. The consequences of exercising this option have
" been authoritatively explained by the House of Lords in *Heyman*
" v. *Darwins* [1942] A.C. 356 where Lord Simon cited with approval
" at page 361 the following dictum of Scrutton, L.J., in an earlier
" case :—

" ' (The innocent party) may, notwithstanding the so-called
" ' repudiation (by the other party) insist on holding his
" ' co-contractor to the bargain and continue to tender due
" ' performance on his part. In that event, the co-contractor
" ' has the opportunity of withdrawing from his false position,
" ' and even if he does not, may escape ultimate liability because
" ' of some supervening event not due to his own fault . . .'

" The learned Judge was of opinion that ' a fresh and valid p. 49, ll. 35–38.
" ' tender of performance by the plaintiffs became necessary before
" ' the defendants could be made liable for the consequences of a
" ' repetition of the earlier breach of contract on their part.' "

27. On the question of transhipment by s.s. " Triport " from Genoa p. 50, ll. 6–10.
to Colombo the learned Judge said that such transhipment was " authorised
" by the contract of affreightment contained in the original Bill of Lading
" P.19, but no evidence was led at the trial as to the nature of the terms
" arranged between the owners of the respective vessels in respect of the
" subsequent carriage of the goods from Genoa to Colombo."

p. 52, ll. 3–7. 28. The learned Judge rejected the arguments—

(A) " on behalf of the Defendants that the tender of the Bill " of Lading, P.19, after s.s. ' Triport ' arrived in Colombo was in " any event invalid and ineffectual, because it was not specifically " produced for the Defendants' inspection at the time of the so- " called tender."

p. 52, ll. 27–33. (B) " on behalf of the Plaintiffs that the rejection of P.19 on " grounds which were manifestly without foundation precludes " the Defendants from subsequently supporting its rejection on " any other valid ground, and that therefore the Defendants cannot " now contend that the tender of P.19 at the time when it was made " in April, 1948, was not a valid tender under the contract."

p. 53, ll. 13–24. 29. On the question of performance of a c.i.f. contract under which the tender of a Bill of Lading operates as the equivalent of a tender or delivery of the goods themselves, the learned Judge referred to *Arnhold Karbeck* v. *Blythe* [1916] 1 K.B. 495, and to Lord Justice Bankes' dictum in *Hannson* v. *Hamel and Horley, Ltd.* [1922] 91 L.J.K.B. 65 where the learned Lord Justice said that the validity of the tender of a bill of lading " depends upon whether it gives the buyer two rights : (A) the right to " receive the goods, and (B) a right against the shipowner who carries the " goods should the goods be damaged or not delivered."

30. Continuing, the learned Judge said :—

" It seems to me, therefore, that the tender of P.19 after the
p. 53, ll. 27–31. " goods had, to the Plaintiff's knowledge, been transhipped at " Genoa into the steamer s.s. ' Triport,' would *prima facie* be " invalid unless both tests laid down in the decisions referred to
p. 53, ll. 33–41. " were proved by the party relying on the tender to have been " satisfied. There is nothing to indicate that the bare production " of P.19 unaccompanied by some other document, would furnish " evidence of a binding obligation on the owner or the master of " s.s. ' Triport ' to release the goods to the assignee of a Bill of " Lading issued by the owners of a different vessel. No evidence " has been led by the Plaintiffs from which the Court can justifiably " infer that the Defendants by accepting the tender of P.19 alone " could have obtained as of right the delivery of the goods which " they were under contract to purchase and which, upon payment " of the contract price they were entitled to receive if available on " board the oncarrying steamer . . There is no evidence as to the " terms of the fresh contract for the oncarriage of the goods in " s.s. ' Triport ' from Genoa to Colombo which were procured at " Genoa by the owners of s.s. ' Laurenskerk ' in the exercise of the
p. 54, ll. 9–16. " right of transhipment reserved to them under the bill of lading " P.19. It has not been proved that the owners of s.s. ' Triport ' " had, for the purposes of the final voyage, become parties, by " addition or substitution, to the original contract of affreightment. " There is certainly no endorsement on the document to this " effect . . ."

Therefore, the learned Judge said that the Appellant had not discharged the burden of proving that it had duly performed its part of the contract and in the result the cause of action pleaded against the Respondents had not been established.

31. Concluding his Judgment, the learned Judge said that he had given careful consideration to the question whether justice required that he should send the case back for a re-trial so as to enable the Appellant to lead further evidence if available on the specific issue as to the tender of P.19 after the date on which the goods were known by both parties to have been transhipped from the original carrying steamer constituted a valid tender in April, 1948, under the contract P.8, and had rejected such a course as it would not be fair to give the Appellant yet another opportunity of supplying the deficiencies in the proof of the cause of action on which it had finally relied. In the result the Supreme Court set aside the Judgment under Appeal and dismissed the Appellant's action with costs in both Courts. p. 54, ll. 35–46. p. 55, ll. 1–7. p. 55, ll. 8–10.

32. A Decree in accordance with the Judgment of the learned Judges of the Supreme Court was entered on 18th August, 1952, and against the said Judgment and Decree this Appeal to Her Majesty in Council is now preferred, leave to appeal having been granted to the Appellant by Decrees of the Supreme Court dated 24th September, 1952, and 21st October, 1952. pp. 55–56. pp. 57, 60.

33. It is submitted that even putting on one side the phrases in P.8 suggesting that the relation between the parties was that of principal and agent, the provisions as to payment therein contained are contradictory and irreconcilable and that the alleged contract is void for uncertainty. It is further submitted that in any event no proper tender of documents was made by the Appellant, that no breach of contract as claimed by the Appellant in the suit was established, and that the Appellant did not show that at the material time it was in a position to claim the price from the Respondents. pp. 63–68. p. 63, l. 9. p. 63, ll. 29–33.

34. The Respondents submit that this Appeal should be dismissed with costs for the following among other

REASONS

(1) BECAUSE the Appellant never tendered to the Respondents proper documents either on arrival of the goods in Colombo or at any time.

(2) BECAUSE neither at the time of the arrival of the goods in Colombo nor at any other material time were the Respondents in breach of the alleged contract.

(3) BECAUSE even if the Respondents were in breach in February, 1948, as in the Plaint herein alleged, the time for performance by them was allowed by the Appellant to remain open until arrival of the goods in Colombo.

(4) BECAUSE no s.s. " Triport " shipping documents were tendered to the Respondents.

(5) BECAUSE there was no evidence to show that the documents tendered constituted a valid tender of documents in the circumstances.

(6) BECAUSE the alleged contract is void for uncertainty.

(7) BECAUSE for the reasons stated therein, the Judgment of the Supreme Court is right and ought to be affirmed.

PHINEAS QUASS.

CARL JAYASINGHE.

T. L. WILSON & Co.,
6 Westminster Palace Gardens,
London, S.W.1,
Solicitors for the Respondents.

No. 30 of 1953.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

BETWEEN

HOLLAND COLOMBO TRADING SOCIETY LTD. . . . . *Appellant*

and

SEGU MOHAMED KHAJA ALAWDEEN and Others carrying on business in partnership under the name, style and firm of "S. S. K. HAJA ALAWDEEN & SONS" *Respondents.*

CASE FOR THE RESPONDENTS.

T. L. WILSON & CO.,
6 Westminster Palace Gardens,
London, S.W.1,
Solicitors for the Respondents.

The Solicitors' Law Stationery Society, Ltd., Law and Parliamentary Printers
Abbey House, S.W.1. WL4188-69038