MASSEY HARRIS CO. (S.A.) LTD. v. CHIAO STORES.

HIGH COURT CIVIL CAUSE No. 11 OF 1938.

Credit sales to Natives Ordinance (Cap. 54)—goods supplied to defendant firm owned by natives—contract not in writing and certified by District Officer—no defence—judgment for plaintiff by default—judgment subsequently reviewed by Subordinate Court and judgment entered for defendant—question whether contract void or unenforceable—subsequent judgment of Subordinate Court upheld by High Court.

The facts and the law are set out in the judgment recorded below, which is an opinion of the High Court under section 29 of the Subordinate Courts Ordinance.

The Credit Sales to Natives Ordinance is now Cap. 167. Its operation was suspended by Ordinance 43 of 1949 until the Governor in Council ordered that it shall come into force. No such order has yet been made.

Robinson, J.: A very interesting point has arisen here. The defendant store is owned by natives from Nyasaland a father and three sons, who trade, according to their elaborate printed letter headings, as general dealers, hawkers, livestock and produce dealers, and they have three departments, farm, transport, builders and contractors.

In July, 1937, the defendants began dealings with the plaintiffs who are a limited company, registered at Salisbury, Southern Rhodesia. The defendants placed their orders by letter and the plaintiffs sent the goods by rail to Mazabuka. The first order was paid for and then the defendants, in September and November, 1937, ordered goods amounting to over £70 and, in spite of constant demands, nothing further has been paid. At last the plaintiffs instructed their solicitor to take action. Judgment went by default and execution was applied for and granted forthwith. The attitude of defendants throughout has been that they admitted the debt but could not pay. They have never disputed it and therefore have never come to Court.

At the eleventh hour it was brought to the notice of the learned Magistrate that the defendants were natives and therefore he re-opened the case under Order XXXIII Subordinate Courts Rules, and having taken evidence to show that the defendants were natives and having given Mr. Turner, who appeared for the plaintiffs, an opportunity to argue that the original judgment should stand and that the Credit Sales to Natives Ordinance, Cap. 54, Revised Laws of Northern Rhodesia, did not apply, he reversed his previous judgment, on the ground that Cap. 54 did apply, and entered judgment for the defendants with costs, subject to the opinion of the High Court.

It had never occurred to the plaintiffs that the Chiao Stores were native owned. There was nothing in the letters written to them at Salisbury to put them on their guard and therefore it is freely admitted

that the requirements of the Credit Sales to Natives Ordinance had not been complied with. In passing, it does seem to me rather amazing that the plaintiffs should have parted with goods worth £56 when £18 was still outstanding, without making careful inquiries about the standing of their debtors.

The first point to be decided is the meaning of the phrase " no contract . . . shall be valid unless ". Does it mean the contract is illegal or void or unenforceable ? In view of section 4, in my opinion the meaning is that the contract is unenforceable. The contract is there: if it has the District Officer's certificate it can be enforced. If it has not, it is not capable of proof in any Court of the Territory. But Mr. Turner argued that this contract was governed by the law of Southern Rhodesia and not Northern Rhodesia and thus Cap. 54 was no bar, assuming there is no equivalent Ordinance in Southern Rhodesia.

Going on that assumption, it would have been better for the plaintiffs, who clearly are entitled to their money in equity, if this contract could have been void instead of unenforceable. If it was void in Northern Rhodesia, its validity could have been determined by the *lex loci contractus*, but, being unenforceable, it is a question of procedure and, in trying the rights of parties under a contract, procedure is governed by the *lex fori* and the mode of proof would thus depend on the law of the country where action is brought, i.e., the Courts here. A case very much on all fours is that of *Leroux* v. *Brown* 12 Q.B. 801. By section 4 of the Statute of Frauds, contracts not to be performed within a year have to be in writing. Leroux sued in England on such a contract, made in France, and not reduced to writing. French law does not require writing in such a case and by the rules of private international law the validity of a contract, so far as regards its formation, is determined by the *lex loci contractus*. Leroux therefore tried to show that his contract was void by English law. He would then have succeeded, for he could have proved, first, his contract, and then the French law which made it valid. But the Court held that the fourth section dealt only with procedure, and did not avoid his contract, but only made it incapable of proof unless he could produce a memorandum of it. As he could not, nor the plaintiffs here a District Officer's certificate, he lost his suit. *Leroux* v. *Brown* is probably the leading case on the point so there is no need to cite the many other decisions which have followed the principle there laid down.

The Courts in this country, in view of Cap. 54, cannot give effect to the contract, even if it is a legally binding contract in Southern Rhodesia. My sympathies, on the facts of this case, are with the plaintiffs, but it is not for me to advise them in their dilemma. I would, however, draw attention to the case of *Taylor* v. *Great Eastern Railway* (1901) 1 K.B. 774 at p. 779, in which section 4 of the Sale of Goods Act, 1895, was construed. That section renders a contract, in certain circumstances, not enforceable by action, but it was held that the contract was not void, and the property in the goods passed to the purchaser. BIGHAM, J., in the course of his judgment, said " what happens if the buyer, after making the purchase, refuses to fulfil any of the statutory conditions which alone will make the contract enforceable against him ? The property in the goods has passed to him, and it may be that he has received the goods

themselves, yet he cannot be sued for the price. My answer is that the seller may call on the buyer to pay for the goods, and, if he fails to comply, the seller may treat the contract as rescinded. The effect of such rescission would be to revest the property in the seller and to entitle him to resume possession."

My opinion on the point of law submitted to the High Court for decision is that the Credit Sales to Natives Ordinance does apply to this contract. The *lex fori* is applicable to cases of this nature and not the *lex loci contractus*. The learned Magistrate has come to a right decision.