1982 May 3

[TRIANTAFYLLIDES, P., A. LOIZOU, MALACHTOS, JJ.]

APOSTOLOS STYLIANOU,

Appellant-Defendant,

v.

LALAKIS MANOLIS,

Respondent-Plaintiff.

(*Civil Appeals Nos.* 5655 *and* 5656).

Civil Procedure—Practice—Pleadings—Amendment—Contract of sale of goods—Substituted by new contract—Which was not specifically pleaded—But evidence about it and the amount payable thereunder adduced by both parties without objection—Whole matter a mere technicality or a development of what had already been averred—Appellant not embarrassed or taken by surprise—No amendment of the pleadings in order to conform with the judgment necessary.

By means of a written agreement* dated July 22, 1975 the appellant agreed to buy from the respondent-plaintiff all his produce of sultana grapes at the agreed price of £2,200. The appellant started taking delivery of the grapes, in pursuance of the contract, but the Government Produce Inspector rejected them as unfit for export because they were affected by disease. In proceedings by the respondent for the recovery of the purchase price the trial Judge found that he was in breach of the clause of the contract regarding the quality of the goods; that following this breach the appellant instead of rejecting the grapes for breach of the condition as to quality he orally agreed with the respondent to alter their contract; and that under the subsequent oral agreement the appellant undertook to dispose the grapes for sale and pay to the respondent the balance left after deducting from the total sum he would collect his expenses.

Upon appeal by the defendant against the judgment adjudging him to pay the amount of £741.360 mils it was contended that the agreement on the basis of which he was adjudged

* The main parts of the agreement are quoted at pp. 289-90 post.

to pay the said amount was not pleaded in either the claim, the defence or the counterclaim. On the other hand the respondent by his appeal disputed the findings of fact of the trial Judge and claimed that on the basis of the written contract he was entitled to the full purchase price.

In spite of appellant's position about the pleadings both parties led evidence to the effect that the original agreement was altered and the Court had evidence suggesting the true amount that was payable by the appellant to the respondent; and the question which arose was whether the Court of Appeal should reverse the judgment or whether, taking into consideration the circumstances of this case and provided it comes to the conclusion that such allegations ought to have been pleaded, it could uphold the judgment and direct, in accordance with *Kemal* v. *Kasti*, 1962 C.L.R. 317 that an amended statement of claim should be filed, or whether on the pleadings as they stand there was no room to hold that such conclusion was open to the trial Judge.

Held, that no reason has been shown to interfere with the findings of fact made by the trial Judge; that on the pleadings as they stand and in particular the contents of paragraph 5 of the defence admitting that the net amount collected by the appellant-defendant was £941.360 mils and which he does not claim to be entitled to retain, this Court is satisfied that the case is sufficiently covered by the pleadings and that in the light of the evidence adduced, without any objection, the parties, and the appellant-defendant in particular must be taken to have assented to have his rights decided in the way they were done; that otherwise they would have objected to the admission of this evidence, the whole matter having obviously been treated as a mere technicality or just a development of what had already been averred, and does not appear to have embarrassed or taken the appellant, who now complains about it, by surprise; that, therefore, an amendment of the pleadings is not necessary in the circumstances otherwise such an amendment could have been ordered (see *Kemal* v. *Kasti* (supra)); accordingly the appeal must be dismissed.

Appeal dismissed.

Cases referred to:

Kemal v. *Kasti*, 1962 C.L.R. 317.

Appeals.

Appeals by plaintiff and defendant against the judgment of the District Court of Limassol (Pitsillides, S.D.J.) dated the 20th November, 1976 (Action No. 3572/75) whereby the defendant was ordered to pay to plaintiff C£741.360 mils in an action for the balance of the sale price of plaintiff's 1975 crop of sultana grapes.

P. Cacoyannis, for the appellant-defendant.

E. Odysseos, for the respondent-plaintiff.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. LOIZOU J.: The appellant—defendant at the trial—was adjudged to pay to the plaintiff (hereinafter to be referred to as the respondent), the sum of C£741.360 mils with interest thereon at 4% p.a. as from the 20th November, 1976, to the date of payment, on an action instituted by the latter by which he claimed C£2,000.—balance of the agreed price of C£2,200.—for the sale to the appellant of the 1975 crop of sultana grapes to be found in his vineyard at Zakaki village on the terms of a written agreement entered into between them on the 22nd July, 1975.

An amount of C£200.—was paid upon the signing of the said agreement and the balance was agreed to be paid upon taking delivery of the crop. The appellant, however, did not pay it as he claimed that the said grapes were found to have been affected by the disease gray mould, locally known as "votritis", which caused them to crack and on account of that they were in such a state that they were unmerchantable and unfit for export, the purpose for which they were intended, to the knowledge of the respondent; and also on the ground that they were not in accordance with the relevant clause of the agreement of sale.

This agreement is one of those printed forms which, as it appears from the terms contained therein that have been to a great extent struck out, are used for the sale of citrus fruit. After giving the names of the seller and purchaser and the kind as being grapes (sultana) there follows the following:

"QUANTITY : *All the crop* (*koutourou*) with a right to the seller 10% more or less.

QUALITY	:	Subject merchantable, suitable for export in accordance with the Export Law.
PRICE	:	C£2,200.—(*two thousand two hundred pounds*).
TIME OF DELIVERY	:	As from the 15th October, until the 31st December at the option of the purchaser.
DOWN PAYMENT	:	C£200.
PAYMENT	:	*Upon taking delivery*".

The words underlined hereinabove are the handwritten ones, the rest are part of the printed form.

It was the case for the respondent that he filled in this printed form and crossed out the inapplicable parts thereof but by mistake he failed to cross out the whole clause under the heading "QUALITY". In support of this contention it was pointed out that another clause under the heading "TIME OF DELIVERY" which is a printed one, it is stated that same would be "from the 25th October until the 31st December at the discretion of the buyers" and though clearly inapplicableas the grapes sold to the appellant should be picked within six days from the date of the contract, yet same was by inadvertence not crossed out. Also it was urged that another obvious inaccuracy is the noncrossing out of the words "with a right to the seller 10% more or less", which comes in conflict with the preceding handwritten phrase "all the quantity (koutourou)" which word "koutourou" incidentally may be translated "at random" or "as they are roughly estimated", or "as they may be found to be".

In fact, the appellant agreed in evidence that these two parts of the printed form of the agreement should have been crossed out by the respondent but by mistake, as he said, he did not notice that they were left to stand. He denied, however, that the clause under the heading "QUALITY" should have been crossed out and according to him the respondent knew that the grapes were intended for export and that he was buying same for that purpose.

The appellant started picking grapes and his first delivery of same to the Packing House was on the 28th July, 1975. The Government Produce Inspectors, however, rejected this load, except 175 okes on account of the said disease. It was the version of the appellant that thereupon he protested to the respondent who attributed their condition to their proximity to the cypress trees and suggested that the appellant might pick grapes away from the trees which the latter did but again the grapes so picked were rejected for the same reason. The respondent thereafter assured him that he was going to spray them as advised by an expert in order to stop the disease and they agreed to settle the matter so that the appellant would pick and dispose of the grapes for sale and pay the respondent the balance left after deducting all his expenses. It was after this alleged new agreement that the appellant on the 29th, 30th and 31st July cleared the affected grapes.

The respondent then sprayed his vineyard for three to four days with chemicals but as such spray would be dangerous to the labourers picking was resumed on the 19th and completed on the 29th August. The appellant thereafter sold the grapes, went to the house of the respondent in order to pay him C£741.360 mils, the balance left after deducting from the proceeds of the sale of the grapes being C£1,343.360 mils, the sum of C£402.—his expenses, and C£200.—the downpayment, but the respondent did not accept such a deduction; he was, however, prepared to deduct only C£500.—from the balance of the C£2,000.—of the contract price.

The learned trial Judge found as a fact that because other clauses in the said contract had to be crossed out and as that was not done by inadvertence, that did not mean that the clause regarding the quality of the grapes should have also been crossed out. He said that it was a material part of it and same was not repugnant to the word "koutourou", since this word was found in the clause as to quantity, whereas if it was intended to refer to quality, also this clause would be repugnant to the clause as to the payment of the balance of the purchase price which by the contract was made payable on delivery of the grapes and obviously this was because the appellant would not pick all the grapes on the date when the contract was made. But clause as to quality clears the repugnancy which would have

existed without it. In other words as he put it the two clauses "as to quality and payment of the balance go side by side in this respect and unless the word 'koutourou' was intended to refer only to quantity, it would be repugnant to both these clauses. In view of the above", he concluded, "I believe that the word 'koutourou' was intended to refer only to quantity and not to quality. Its meaning is restricted in this case because the Court has a duty to make an effort to give effect to every clause in the contract and to try and save it".

Having reached the conclusion that the respondent was responsible for the quality of the grapes, the trial Judge then proceeded to examine the question whether same was at the time of their contract of the quality agreed upon. From the evidence adduced he believed that the grapes found diseased only six days from the day when the contract was made and for which ample credible evidence was adduced by the appellant and his witnesses, including Mr. Tsakistos, (P.W.2), and concluded that the respondent-plaintiff breached the clause regarding quality and held that at the time the contract was made neither delivery of the grapes was made nor the property in them passed to the defendant.

After referring to the law as to the passing of property in goods sold, he said:

> "Therefore, the plaintiff is responsible for the disease of the grapes which at the time of the contract was a latent defect and not only would he not succeed in this action but he would be answerable to the defendant in damages as per the counterclaim had the parties not orally agreed to alter their contract as to the price payable by the defendant to the plaintiff. By this subsequent agreement which, according to the defendant altered their contract, was made when he discovered the disease of the grapes after he picked only one pick-up load and before he took delivery of the majority of the grapes and I believe that it is because of this subsequent agreement that the defendant, instead or rejecting them for breach of the condition of the contract as to quality in view of their being unfit for export, he proceeded to execute fully his part of the contract".

And then the learned trial Judge went on to say the following:

> "The defendant could, under sub-section 2 of section 12

of the Sale of Goods Law, Cap. 267, treat their contract as repudiated and he then also could, under sub-section 1 of section 59 of the said Law, either (a) claim diminution or extinction of the price, or (b) damages for the breach. The defendant, however, elected not to treat the contract as repudiated but he elected to go through with it as altered. Therefore, he cannot claim damages under the last mentioned sub-section; but he could claim diminution of the price, not under this sub-section in which repudiation is a necessary pre-requisite, but under their subsequent oral agreement. Thus defendant's counterclaim should fail.

According to the defendant, this subsequent oral agreement was that the defendant would dispose the grapes for sale and to pay to the plaintiff the balance left after deducting from the total sum he would collect all his expenses".

The appellant-defendant, by his present appeal challenges only that part of the judgment by which the learned trial Judge decided that the parties agreed to amend the agreement between them, dated the 22nd July, 1975, with regard to the price to be paid by him for the grapes and that by virtue of this amended agreement his counterclaim was dismissed and he was adjudged to pay as above, instead of adjudging the respondents to pay damages for breach of contract about the quality of the grapes sold by virtue of the agreement as per his counterclaim. One of the arguments advanced is that this agreement on the basis of which the appellant was adjudged to pay C£741.360 mils, balance of the purchase price, was not pleaded in either the claims, the defence or the counterclaim.

In spite of this alleged position of the pleadings both parties led evidence to that effect and the Court was faced with evidence suggesting the true amount that was payable by the appellant-defendant to the plaintiff at the end of the day, and the question arises whether, we, on appeal should reverse that judgment, or whether taking into consideration the circumstances of this case and provided we come to the conclusion that such allegations ought to have been pleaded we could uphold the judgment and direct, in accordance with the authority of *Halil Kemal* v. *Georghios M. Kasti*, 1962 C.L.R. 317, that an amended

statement of claim should be filed before recovery of the amount which the appellant was adjudged to pay, or whether on the pleadings as they stand there was room to hold that such conclusion was open to the trial Judge.

The respondents by their appeal dispute the findings of fact of the trial Judge and claim that on the basis of the written contract between them and the appellant they were entitled to the full purchase price inasmuch as the word "koutourou" "at random" referred not only to the quantity but also to the quality of the purchased grapes.

Having heard the able arguments of both sides and gone through the judgment and the evidence adduced, we have come to the conclusion that no reason has been shown for us to interfere with the findings of fact made by the trial Judge and his approach as a whole both on the claim and the counterclaim. On the contrary, we are satisfied that there has been a valid oral variation of the original agreement as regards the amount to be paid for the grapes purchased under it and actually collected, and which was acted upon and the purchaser incurred obligations thereby to pay to the seller the money that he has been adjudged to pay under the judgment. We do not accept the contention of counsel for the appellant/defendant that there was no new agreement concluded between the parties, but only negotiations with a view to a settlement which could not be the basis of an adjudication.

In our view, as a result of it there has arisen an obligation on the part of the appellant/defendant to pay to the respondent the money received from the collection and disposal of the grapes of the respondent/plaintiff which money cannot be retained by the purchaser. In fact this was the most favourable approach the learned trial Judge could reach on the evidence as accepted by him and also born out from the written contract, exhibit 1.

Moreover on the pleadings as they stand and in particular the contents of paragraph 5, of the defence admitting that the net amount collected by the appellant/defendant was £941.360 mils and which he does not claim to be entitled to retain, we are satisfied that the case is sufficiently covered by the pleadings and that in the light of the evidence adduced, without any objection, the parties, and the appellant/defendant in particular

must be taken to have assented to have his rights decided in the way they were done. Otherwise they would have objected to the admission of this evidence, the whole matter having obviously been treated as a mere technicality or just a development of what had already been averred, and does not appear to have embarassed or taken the appellant, who now complains about it, by surprise.

Therefore we do not think that any amendment of the pleadings in any material respect is necessary in the circumstances otherwise we could have ordered such an amendment in order to make it conform with the judgment of the trial Court and our judgment on the basis of the principles expounded in the case of *Halil Kemal* v. *Georghios M. Kasti* (supra).

For all the above reasons both appeals which have been heard together are dismissed and in the circumstances we make no order as to costs.

Appeal dismissed. No order as to costs.