1988 February 5

[TRIANTAFYLLIDES, P., LORIS, STYLIANIDES, JJ.]

DEMECO COMPANY LIMITED,

Appellants-Defendants.

v.

BECKHOFF GASELLCHAFT MBH,

Respondents - Plaintiffs.

(Civil Appeal No. 7198).

Evidence — Documents produced as exhibits by consent — Record shows that they were put in as evidence and not for identification.

Sale of goods — F.O.B. contract — Seller's obligations thereunder — When the property in the goods passes to the buyer — When the risk passes to the buyer.

Civil Procedure — Pleadings — Purpose of — A case should be decided on its pleaded facts.

The judgment appealed from adjudged the appellants (defendants) to pay £4,412.51 for the price of goods sold and delivered to them by the plaintiffs.

No oral evidence was adduced and the trial Court relied on admissions in the pleadings and two bundles of documents produced by counsel for the parties.

The grounds on which this appeal was argued were: (a) The aforesaid documents were not evidence as they were put in for the limited purpose of identification, (b) The trial Court erroneously considered para. 3 of the defence as an admission of the contract of sale, (c) The goods were not delivered and ownership in them was not transferred to the defendants, and (d) The plaintiffs accepted the return of the goods and therefore released the plaintiffs.

Held, dismissing the appeal: (1) The production of a document for the limited purpose of identification does not make it evidence. The record of the trial Court leaves no room for doubt that the documents in this case were formally put in evidence and the contents thereof were evidence before the trial Court.

(2) The pleadings in conjunction with the documents adduced made it clear that there was a contract for the sale of the goods.

(3) Such contract was a F.O.B. contract. The seller's contractual duty was to deliver the goods on board ship at his own expense for carriage to the buyer. There were no terms in the contract of the litigants displacing the presumption that the seller's duty is to give up possession of the goods to the ship upon the terms of reasonable and ordinary Bill of Lading and that the property passes to the buyer upon shipment.

(4) No facts are set out in the pleading of the appellants-defendants, from which the question raised by ground (d) could be determined by the trial Court. A Court of Law has to confine itself to the issues as appearing at the close of the pleadings or properly added to at the date of the hearing.

Appeal dismissed.
No order as to costs.

Cases referred to:

Galip v. Suleyman (1963) 2 C.L.R. 129;

Stock v. Inglis [1884] 12 Q.B.D. 564;

Carlos Federspiel and Co. S.A. v. Charles Twing and Co. Ltd. [1957] 1 Lloyd's Report 240;

Iordanou v. Anyftos (1959-1960) 24 C.L.R. 97;

Loucaides v. C.D. Hay and Sons Ltd. (1971) 1 C.L.R. 134;

HjiPavlou v. Jinaro Terra (1982) 1 C.L.R. 433;

Courtis and Others v. Iasonides (1970) 1 C.L.R. 180;

Mahattou v. Viceroy Shipping Co. Ltd. and Another (1979) 1 C.L.R. 542;

Federated Agencies v. Tsikkos (1979) 1 C.L.R. 134.

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Demetriou, Ag. P.D.C.) dated the 30th April, 1986 (Action No. 2569/84) whereby they were adjudged to pay to the plaintiffs the sum of £4,412.51 cent for the price of goods sold and delivered to them by the plaintiffs.

G. Papatheodorou, for the appellants.

R. Stavrakis, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The Judgment of the Court will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: This is an appeal by the defendants against the Judgment of the District Court of Nicosia, whereby the defendants were ordered and adjudged to pay to the plaintiffs the sum of £4,412.51 with interest thereon at 6% per annum from 30/4/86 to date of payment, for the price of goods sold and delivered by the plaintiffs to the defendants.

The plaintiffs, a West German company, is manufacturing and dealing in aluminium products.

The defendants are a company registered in Cyprus, carrying on business of import, export, manufacture and sale of aluminium.

The plaintiffs by this action claimed C£4,412.51, the equivalent of 21,008.25 German marks, being the price of a quantity of aluminium shutter profiles sold by them and delivered to the defendants under a F.O.B. contract.

No oral evidence was adduced and the trial Court relied on admissions in the pleadings and two bundles of documents produced by counsel for the parties.

The grounds on which this appeal was argued are:-

(a) That the trial Court erroneously used and relied on the documents produced on 24/10/85, as allegedly these documents were not evidence as they were produced for a limited purpose only.

(b) That the trial Court erroneously considered the allegations in paragraph 3 of the statement of defence as an admission of the contract of sale.

(c) That the goods were not delivered and ownership was not transferred to the defendants.

(d) That the plaintiffs by entering into a new agreement to accept the return to them of the subject goods released the defendants of their obligation to pay the price thereof.

In connection with the first ground, it is well settled that the contents of a document, as in this case, is primary evidence; the documents have to be produced as evidence.

Order 33, rule 8 of the Civil Procedure Rules provides that every document or other exhibit put in evidence shall be marked by a Judge or by an officer of the Court when it is put in, and the mark placed thereon shall be noted in the minutes of the Court.

The minutes kept by the trial Judge are before us. On 24/10/85 it was recorded by the trial Judge:-

«Both counsel apply that two bundles of documents be put in by consent. The one by the plaintiffs and the other by the defendants. They are so marked as put in by the parties.

Court: Bundles put in and marked *Exhibits 1a-7 and 2a-e* respectively.»

It was contended by counsel for the appellants-defendants that these documents were produced for identification purposes only and relying on *Said Galip v. Umit Suleyman* (1963) 2 C.L.R. 129, invited the Court, not to consider them as evidence.

The production of a document for the limited purpose of identification does not make it evidence. It must be formally put in evidence.

In the present case, however, the record of the trial Court leaves no room for doubt that these documents were formally put in evidence, and the contents thereof were evidence before the trial Court and it was rightly considered as such.

With regard to the second ground, the admission in the third paragraph of the statement of defence (that there was agreement in principle for the sale and delivery by the plaintiffs to the defendant of the aluminium products, described in paragraph 4 of the statement of claim, but that the plaintiffs never delivered to the defendants the goods ordered according to the terms of the agreement), in conjunction with the contents of the documentary evidence, make it abundantly clear that an agreement was entered into between the parties for the sale of the aluminium products by the plaintiffs to the defendants at the stipulated price as pleaded by the plaintiffs.

This was a F.O.B. contract; that is «Free on Board»; and the seller's contractual duty in such a contract is to deliver the goods on board - ship at the contractually appointed port (Hamburg in this case), at his own expense for carriage to the buyer.

There were no terms in the contract of the litigants displacing the presumption that the seller's duty is to give up possession of the goods to the ship upon the terms of reasonable and ordinary Bill of Lading and that the property passes to the buyer upon shipment. The delivery contemplated by their F.O.B. contract is delivery on board - ship, and not otherwise - (*Stock v. Inglis* [1884] 12 Q.B.D. 564; *Carlos Federspiel & Co. S.A. v. Charles Twigg & Co. Ltd.* [1957] 1 Lloyd's Rep. 240).

The goods were ascertained, they were specific goods, they were loaded on the ship at Hamburg and the risk passed to the buyer upon shipment - (see Halsbury's Laws of England, Fourth Edition, volume 41, paragraphs 931, 933, 934, 935, 936 and Carver Carriage by Sea, Thirteenth Edition, volume 2, paragraphs 1618, 1621).

With regard to the last ground of appeal, we have to observe that in the statement of claim, paragraphs 7 and 8, it is alleged that due to the conduct of the defendant the plaintiffs accepted that the goods be returned to them, provided that they would be in the same good condition they were at the time of delivery by the plaintiffs to the defendants; but it was ascertained that the goods were completely damaged and were not of merchantable quality any more.

These allegations are simply denied in the statement of defence.

The pleadings in an action are the foundations of the litigation; they must be carefully prepared as the set of rails upon which the train of the case will run.

No facts are set out in the pleading of the appellants-defendants, from which the question raised by this ground of appeal could be determined by the trial Court.

A Court of Law has to confine itself to the issues as appearing at the close of the pleadings or properly added to, at the date of the hearing- (*Eleni Panayiotou Iordanou v. Polycarpos Neophytou Anyftos* (1959-1960) 24 C.L.R. 97, at p. 106; *Christakis Loucaides v. C.D. Hay and Sons Ltd.* (1971) 1 C.L.R. 134 and *Hjipavlou v. Jinaro Terra* (1982) 1 C.L.R. 433).

The case is decided on its pleaded facts to which the Law must be applied. If in the course of the trial it appears that a party's pleading requires amendment, steps for that purpose must be taken as early as possible in order to give full opportunity to the parties affected by the amendment to meet the new situation; to run their case on the new rails - (*Homeros Th. Courtis and Others v. Panos K. Iasonides* (1970) 1 C.L.R. 180 at p. 183; *Andreas Mahattou v. Viceroy Shipping Co. Ltd. and Another* (1979) 1 C.L.R. 542; and *Federated Agencies v. Tsikkos* (1979) 1 C.L.R. 134).

A point raised by counsel in his address, not based on factual averments in the pleadings, should not be taken up by the Court.

For the foregoing reasons this appeal fails and is hereby dismissed.

In view, however, of all the circumstances of the case, we make no order for costs in this appeal, but we leave undisturbed the Order in favour of the plaintiffs-respondents, made by the trial Court.

Appeal dismissed. Order for costs as above.