**(1960) 07 GAU CK 0007**

**In the Gauhati High Court**

**Case No :** First Appeal No. 22 of 1955

Bhowrilal Mehesri and Others APPELLANT

Vs

State of Assam RESPONDENT

**Date of Decision :** 01-07-1960

**Acts Referred:**

Constitution of India, 1950 — Article 299, 300
Contract Act, 1872 — Section 222, 223
Essential Supplies (Temporary Powers) Act, 1946 — Section 17(2), 3
Government of India Act, 1935 — Section 175, 175(3)
Sales of Goods Act, 1930 — Section 16, 59

**Citation :** AIR 1961 Guw 64

**Hon'ble Judges :** C.P. Sinha, C.J

**Bench :** Single Bench

**Advocate :** S.K. Ghose, S.C. Das and J.P. Bhattacharjee, for the Appellant; M.C. Pathak, Junior Govt. Advocate, for the Respondent

**Final Decision :** Allowed

## Judgement

C.P. Sinha, C.J.—This appeal has been preferred by the plaintiffs to an action for recovery of a certain sum of money. The facts in brief are that the plaintiffs as partners of a registered firm known as Hariram Mohanlal at Bongaigaon in the district of Goalpara, Assam were appointed wholesale dealers under the Foodstuffs (Foodgrains) Control Order, 1951 and as such were given licence in the form attached to the Appendix of the said Control Order. On receipt of a telegram confirmed by a sub-sequent letter from the Deputy Director of Procurement, Dhubri, on 23-10-1951, asking the plaintiffs to lift 500 maunds of milo by 24-10-1951, from the Government godown at Dhubri, paying price at Rs. 16-13-0 per maund for sale to retailers at Rs. 17-5-0 plus Re. 1/- per maund as carriage charge, the plaintiffs in obedience to the direction, deposited in the Dhubri treasury Rs. 8,405-4-0 under two challans, dated 25-10-1951 and 27-10-1951 respectively, and took delivery of 500 maunds of milo and carried the same to their Bongaigaon godown spending Rs. 500/- as transport charges.

 

By his, letter dated 23-10-1951, the Sub-divisional Officer, Goalpara, passed orders on the plaintiffs to bring 100 maunds of ratio which the plaintiffs did, and on the verbal directions of the Sub-divisional Officer, delivered 100 maunds of milo in the Rice and Oil Mills of Rohman Stores, Goalpara-That Store, however, brought, back the delivered quantity of milo to the plaintiff''s godown at Bongaigaon and made over the same to the plaintiffs.

This foodgrain milo could not be sold to any retailer and in spite of the order of the Sub-divisional''. Officer, the retailers refused to take delivery of the milo allotted to them. The plaintiffs asked the Sub-divisional Officer to take back the milo of 500 maunds to the Government godown and to refund the sum of Rs. 8,406-4-0 deposited, plus Rs. 600/- being the transport charges, but the Sub-divisional Officer took no steps. Thereupon, the plaintiffs asked the Director of Supply, Assam, to take back the milo and to refund the price with the cost of transport incurred.

By his letter dated 15-3-1952, the Director of Supply directed the plaintiffs to contact the Sub-divisional Officer, Goalpara, to whom necessary instructions had been sent, but the Sub-divisional Officer-took no steps in the matter; thereupon, the plaintiffs wrote to the Chief Secretary to the Government of Assam, to take back the 500 maunds of milo issued to the plaintiffs and to refund Rs. 8,406-4-0 deposited at the Dhubri treasury, plus the transport charges.

No step, however, was taken. The Sub-divisional Officer, Goalpara, as mentioned above, could not dispose of the milo to retailers, and so the milo was lying in the godown of the plaintiffs. The plaintiffs having thereby suffered a loss of Rs. 9,006-4-0, being the price of the milo deposited plus Rs. 600/- as carrying charges because of the action of the Government and its officers, they therefore, brought a suit for recovery of a sum of Rs. 9,250/- from the State of Assam, including interest at six percent per annum.

2. The defence was that the plaintiffs were under no obligation to purchase the 500 maunds of milo and when they did, they undertook all the risks, of business with full knowledge of the market and-there was no stipulation with the defendant to refund the price of the milo, in case the plaintiffs failed to sell the same. The plaintiffs were given all opportunities to sell all the milo to different P. T. Cs. later on within the State of Assam, and if the plaintiffs failed to dispose of the same, it was due to their fault.

The other points raised were that the notice u/s 80 of the CPC was not validly served and it was insufficient. There was no cause of action against the defendant and the plaintiffs were not competent to sue. It is admitted that this firm of the plaintiffs did purchase the 500 maunds of milo from the defendant (see para 6 of the written statement).

3. The case was heard by the learned Subordinate Judge at Dhubri and ho dismissed the suit on the ground that the claim having arisen out of a contract and there being no contract with the State of Assam in accordance with the

 

provisions prescribed by the Government of India Act, 1935 or by the Constitution under Article 300, the Government of Assam could not be bound by such a con-tract. The Court below held that even if the act of the State Government amounted to tort, the tort was committed not by the State of Assam, but by the servants of the State and the State could not be held liable. The Court below has recorded the following findings:

(1) That the notice u/s 80 of the CPC was validly served; (2) that the plaintiffs did not indent for the milo in question, but the plaintiffs had to act as per the directions given by the Deputy Director of Procurement in the telegram (Exhibit No. 2), wherein; the directions were to the effect that the milo should be distributed as per the order of the Sub-divisional Officer, Goalpara, though the different retail dealers within the sub-division;

(3) that no retail dealer lifted any quota allotted to him, as per the order of the Sub-divisional Officer;

(4) that the wholesale dealers were bound to lift the quota allotted to them and the wholesale dealers were to sell the quota according to the permit issued and that they could not dispose of them according to their will;

(5) that the foodstuff in question, namely, milo, was considered by the consumers as uneatable;

(6) that the Sub-divisional Officer was not helpful to the plaintiffs in disposing of the milo and after having noticed this attitude on the part of the Sub-divisional Officer, the plaintiffs moved the Director of Supply, Assam, to get back the milo and to make refund of the amount deposited;

(7) that a letter was addressed by the plaintiffs to the Chief Secretary to the Government of Assam, as per Exhibit No. 11, but that no reply was received;

(8) that the suit was filed on 17-9-1952, and after the filing of the suit, the letter (Exhibit G) dated 16-9-1952 was received by the plaintiffs directing them to arrange sale to a party or parties outside the State;

(9) that no letter was received by the plaintiffs before the institution of the suit from the defendant or their officers permitting the plaintiffs to sell this foodgrain outside Assam;

(10) that the Supply Inspector admitted having failed to arrange sale locally by approaching the garden people (tea gardens), and as a result, the entire quantity of milo was lying undisposed of in the godown of the plaintiffs;

(11) that the plaintiffs had no doubt suffered Unnecessary loss for no fault of theirs and in which they had no free hand, but this was due to the acts of the servants of the State. The present suit being against the State and not against the servants of the State, the; suit was not maintainable, because the contract was not in the form prescribed by law; and

 

(12) that nothing had been proved to show that for any undisposed of articles, the price was to be refunded. For a contract in which the State was a party, a document was necessary, but there was no such contract reduced to writing. If the licence was a contract, it was not properly proved.

As I have said, on the findings mentioned above, the suit was dismissed.

4. All the facts necessary to be proved in this case have been proved and the findings are all in favour of the plaintiffs. The plaintiffs have lost, however, on the ground that the contract between the plaintiffs and the State of Assam was not in accordance with the provisions of Section 175(3) of the; Government of India Act, 1935, and Article 299 of the present Constitution, and also because the licence or permit given to the plaintiffs under the provisions of the Assam Controlled Commodities Distribution Order, 1950, was not filed or proved.

In my opinion, the view of the Court below is not correct. Admittedly, there was no contract in writing between the plaintiffs on the one land and the State of Assam, the defendant, on the other, and therefore, there is no question of the contract being in accordance with the provisions of Section 175(3) of the Government of India Act, 1935, or Article 299 of the Constitution. Apart from this aspect of the matter, there was no suggestion by any of the parties that there was any contract in exercise of the executive authority of a province or the State.

In this view of the matter, none of the provisions contained in Section 175 of the Government of India Act, 1935. or Article 299 of the Constitution has any application. So far as the other finding about non-filing of the licence or the proof thereof Hit concerned, it is admitted by the defendant that the plaintiffs were the Government wholesalers and ration suppliers for the area under Sidli Police station at Bongaigaon.

Under paragraph 1 of the plaint, the plaintiffs asserted that "the business of Hariram Mohanlal is Government wholesaler and ration suppliers for the area under Sidli Police station at Bongaigaon". In the written statement by paragraph 2, this statement of the plaintiffs does not appear to have been controverted. Paragraph 2 of the written statement reads as follows:

With reference to the statement in para 1 of the plaint, the defendant does not admit that the plaintiffs are the owners of the Firm Hariram Mohanlal at Bongaigaon. The burden is on the plaintiffs to prove that they are the partners of the Firm Hariram Mohanlal at Bongaigaon.

Thereby, the defendant admitted that the firm of Hariram Mohanlal was the Government wholesalers and ration supplier as mentioned in paragraph although it was denied that the plaintiffs wore partners of that firm. No issue was raised at the trial whether the plaintiffs were partners of the said firm or not.

The only relevant issue in this regard was whether the plaintiffs were competent to sue, and that issue was answered in the affirmative by the Court below. Apart from this, in the said Assam Controlled Commodities Distribution Order, 1950, there is a form of licence attached by way of schedule and even if the particular licence in favour of the plaintiffs was not produced in Court, that does not affect the rights of the parties, if such right flows from the provisions of the Order for the reason that it must be taken that the licence granted to the plaintiffs was in terms mentioned in Schedule 1 to that Order.

In my judgment, the relationship that was created between the defendant and the plaintiffs was in the nature of relationship between a principal and an agent, and if that kind of relationship is established between the two, under the provisions of the Contract Act -- the relevant sections being 222 and 223 -- the plaintiffs would be entitled to a decree for any loss sustained by them as agent.

From several provisions of the said Assam Controlled Commodities Distribution Order, 1950, I would make an effort to show that there was relationship of principal and agent between the defendant and the plaintiffs. This Assam Controlled Commodities Distribution Order, 1950, has been and will hereinafter be referred to as the "Order". The preamble of the Order runs as follows:

In exercise of the powers conferred by Section 3 of the Essential Supplies (Temporary Powers) Act, 1946 (Central Act XXIV of 1946), read with the Notification of the Government of India, Department of Food No. PY-603(2)1 dated 21-10-1948 and Section 17(2) of the said Act, and with the concurrence of the Government of India, the Governor of Assam is pleased to make the following Order:

1. Short title, extent and commencement:-- (1) This Order may be called the Assam Controlled Commodities Distribution Order, 1950....

"Wholesale dealers" means a person, firm or association of individuals dealing in any controlled commodity, who sells or supplies the same on the strength of a licence as per Schedule. I to be issued why the District Officers on realisation of fees to be prescribed and notified by Government from time to time to any wholesale dealer or retail dealer or firm or association or Government or semi-Government department not direct to consumers, unless so ordered by a District Officer or Director of Government and Includes a Procuring Agent, Importing Agent, Distributing Agent, Sub-divisional Agent or other agency appointed by District Officer or Director of Government for the procurement of any controlled commodity from any source and movement of the same to Assam and/or for the distribution of the same in any specified area in accordance with the directions given by the District Officer, Director and Government, vide Section 2(vii); some of the other relevant provisions of the Order have to be read:

Paragraph 3(1):

For the purpose of ensuring equitable distribution of controlled commodity, the District Officer Director or Government may appoint as many (sic) dealers and wholesale dealers for any area for such commodity as he thinks fit.

Paragraph 12(3):

 

Any person or a retail dealer or wholesale dealer or any agent or employee of theirs shall not acquire, sell, supply or otherwise dispose of or offer or attempt to acquire, sell, supply or otherwise dispose of any controlled commodity in any area or in any manner other than in accordance with the provisions of paragraph 3 of this Order.

Para 12(4):

A retail dealer or wholesale dealer, or any agent or employee of theirs, shall not willfully disobey any direction made by the District Officer, Director or Government under the powers conferred by paragraph 4 of this Order.

Paragraph 13 provides penalties and it reads as follows:

Any person who contravenes any provisions of this Order shall be punishable under the Essential Supplies (Temporary Powers) Act, 1946 as amended from time to time.

And Schedule I prescribes the following form of licence:

Serial No.... Retail dealer/wholesale dealer No....

The licence is issued under paragraph 3 of the Assam Controlled Commodities Distribution Order, 1950, to....proprietor of... to deal in controlled articles specified below subject to the conditions that he:

(1) abides by the provisions prescribed by (sic) under the said Order.

(2) Complies with the directions issued from time to time by the District Officer, (Deputy Commissioners, Additional Deputy Commissioners, Sub-divisional Officer and Political Officers, etc.), in respect of acquisition, storage, supply, distribution and maintaining reserve stock of such articles and

(3) maintains proper accounts as directed from time to time.

This licence is valid up to....and is subject to suspension or cancellation at any time for contravention of any of the above conditions.

5. It is not disputed in this case that the food grain known as milo was one of the controlled food grains and further that the Deputy Director of Procurement, Dhubri, a duly authorised person under, the Order sent to the plaintiffs a telegram, which was later confirmed by Memo No. P. 6-c/12999-04 dated 23-10-1951, for lifting 500 maunds of milo from Dhubri after payment of the price as mentioned therein.

It is also clear from the said telegram (Exhibit No. 2), as confirmed by letter (Exhibit No. 3), that this foodgrain which was to be lifted by the plaintiffs were to be sold through retailers. It is also the admitted position that the wholesaler could not have sold the milo to anybody whom the plaintiffs chose; but, it had to be sold to the retailers under the orders of the proper authority.

 

The retail dealers had to be nominated by the authorities under the Order, in this case being the Sub-divisional Officer, and upon the findings no retail dealer was prepared to take this milo, so much so that 100 maunds of milo were taken to the shop of a retailer, one Rice and Oil Mill of Rahman Stores at Goalpara from Bongaigaon, but the same was returned to the plaintiffs. Even thereafter, the plaintiffs made frantic efforts by approaching one officer or the other for the disposal of the commodity, but no such orders were given nor any arrangement made for its disposal.

6. The Essential Supplies (Temporary Powers) Act, 1946 (Act No. XXIV of 1946) was enacted to provide for the continuance during the limited period of powers to control the production, supply and distribution of and trade and commerce in, certain commodities". Under the Act, the Government had taken upon itself the powers "for regulating by licences, permits or otherwise the production or manufacture of any essential commodity" and, under those powers, the order in question was made by the State Government of Assam.

The defendant, therefore, having taken upon itself the burden of distribution of foodgrains including the milo, the foodgrain in question, by the different provisos in the Order, chalked put a plan for distribution of these foodgrains to the consumers and the scheme was that either the defendant or on its behalf, the Director or the District Officer were to appoint wholesalers and retail dealers and the wholesalers had to lift the foodgrains from Government godowns on payment of the price fixed, and in their turn, the wholesalers were to sell on a certain margin of profit fixed by those authorities to the retail dealers or other wholesalers appointed and nominated by the proper authorities. The wholesalers were not allowed to sell to any other person.

In the present case, the plaintiffs on receiving the orders of the proper authority lifted the foodgrain in question, deposited the price into the treasury and tried their very best to sell the said food-grain to any retailer, who may be nominated by the authorities. One retailer was chosen and he was supplied 100 maunds by the plaintiffs, but he returned the same to the plaintiffs, and thereafter in spite of the best efforts of the plaintiffs, no retailer was nominated by the authorities concerned to buy from the plaintiffs the foodgrain in question. The result was that the foodgrain was lying in the godown of the plaintiffs.

Even then, the plaintiffs wrote to several authorities including the Chief Secretary to the Government of Assam, drawing their attention to the fact that no retailer was prepared to buy it and that some arrangement should be made for its disposal. But until the institution of the suit, upon the finding of the Court below, no directions were given and upon the evidence of P. W. 2, the Secretary of the Food Committee at Birjhora, it is quite clear that the foodgrains in question were not considered eatable and therefore, nobody was prepared to buy the same.

7. On the above facts, in my opinion, it cannot but be held that a relationship of principal and agent was established between the defendant and the plaintiffs.

 

Having come to the conclusion that the plaintiffs were the agents appointed by or on behalf of the defendant, we have to find out if the defendant as in any manner liable to indemnify the plaintiffs against the loss, which the plaintiffs had to suffer for carrying out the orders of the defendant or its officers. Now Sections 222 and 223 of the Contract Act have to be read:

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

223. Where one person employs another to do an act and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

In this case, the plaintiffs by being given a licence as a wholesaler were under the provisions of the Order to lift the foodgrains from the godown of the defendant. These foodgrains had to be distributed under orders of the defendant or its officers to the retailers at some profit. The plaintiffs did all that was possible for them to do, but the goods that they had lifted from the godown of the defendant were not disposed of for no fault of theirs, but because the defendant or its officers failed to find out a retail dealer or dealers, who could buy these foodgrains from the plaintiffs, although under the provisions of the Order and the licence, the said goods could have been sold only to some approved retail dealers, and the consequence was that the plaintiffs could not dispose of their goods which they had lifted from the godown of the defendant.

In my opinion, the plaintiffs must be said to have acted as an agent of the defendant in good faith and in that good faith, they lifted the foodgrains from the godown of the defendant, paid the price for it in the hope that they would be earning a little profit out of the bargain, when these food-grains were sold to the retail dealers. But, in spite of their best efforts, the foodgrains in question were not sold and the reason was that the foodgrains were not fit for human consumption.

In my opinion, on the facts mentioned above, the defendant cannot escape the liability as the principal and the defendant has to indemnify the plaintiffs of all losses consequent upon their acting in good faith as an agent of the defendant. Thus, upon the terms of the Order and the licence, there was implied contact between the wholesaler and the defendant, the State Government, to indemnify the plaintiffs against all losses and liabilities incurred by the plaintiffs in consequence of the plaintiffs bona fide acting as the agent of the defendant.

8. Under the several provisions of the Order, which I have quoted above, a right was created in the plaintiffs to sell their commodities at some profit to the retail dealers nominated by the defendant or its officers; but, the plaintiffs could not sell the foodgrains in question to the retailers for no fault of theirs and thus the plaintiffs are entitled to refund of the price they paid to the defendant with

 

transport charges, as also the profit they had earned by selling to retail dealers as per terms mentioned in Exhibits Nos. 2 and 3.

The plaintiffs not having sued for their profit, they are entitled to a decree only for the price paid and the transportation charges. They are, however, not entitled to any interest on this amount, as there was no agreement for payment of interest. The suit will thus be decreed for the aforesaid sum of money, namely, the price paid with transport charges as claimed with interest at 6 per cent from the date of J suit until realisation.

9. This case can be looked upon from Anr. point of view. Under the provisions of the Order, read with the Essential Supplies (Temporary Powers) Act, 1946 (Act No. XXIV of 1946), the State Government have taken power for regulating the production, supply and distribution of essential commodities which, within the definition, included foodstuffs. By exhibit No. 2, the plaintiffs firm was ordered to lift immediately 500 maunds of milo from Dhubri on payment of the price mentioned therein for the purpose of being sold to retailers, who should in their turn sell to consumers and this exhibit No. 2, the telegram, was confirmed by exhibit No. 3, the letter dated 25-10-1951.

There is no doubt, therefore, that this sale of milo by the defendant or its officers to the plaintiffs firm was meant for ultimate distribution to consumers. This foodgrain milo, however, was unfit for human consumption and on that account, could not be sold by the plaintiffs to retailers. On these facts, in my opinion, the provisions of Section 16, read with Section 59 of the Indian Sale of Goods Act, 1930 (Act No. IX of 1930) should apply. I would read the relevant provisions of these two sections:

16. Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller''s skill or judgment, and the goods are of a description which it is in the course of the seller''s business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose;...

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality;...

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade...

Section 59:

 

(1) Where there is a breach of warranty by the (sic) or where the buyer elects or is compelled to (sic) any breach of a condition on the part of the (sic) as, a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to (sic) the goods; but he may --

(a)....

(b) sue the seller for damages for breach of warranty....

As this point was not raised by any of the parties, (sic) do not wish to elaborate this aspect of the matter (sic) I would like to rest my judgment 6n the provision of Sections 222 and 223 of the Contract Act.

10. The Plaintiffs are entitled to their costs of (sic) Court and of the Court below. u/s 82, Civil Procedure Code, the defendant is allowed three (sic) time from today to pay the decretal amount (sic) and interest to the plaintiffs.

 