

(1990) 01 KL CK 0047
In the High Court Of Kerala
Case No : A.S. No. 309 of 1981

Board of Trustees of Cochin Port Trust APPELLANT
Vs
A.L. Chopra RESPONDENT

Date of Decision : 11-01-1990

Acts Referred:

Sales of Goods Act, 1930 — Section 46(1), 46(i)(c), 54, 54(2)

Citation : (1990) 1 KLJ 319

Hon'ble Judges : K.G. Balakrishnan, J

Bench : Single Bench

Advocate : K.V.R. Shenoi and J.B. Koshy, for the Appellant; H. Sivaramakrishna Iyer, for the Respondent

Judgement

K.G. Balakrishnan J.

1. This appeal is directed against the judgment and decree passed by the Additional Sub Judge, Cochin in O.S. No. 38 of 1979. The plaintiff, Board of Trustees of the Cochin Port Trust, represented by its Chairman, filed suit for realisation of an amount of Rs. 46,343.23 with interest at the rate of 15% per year. The plaintiff on 12-11-1975 invited tenders for the sale of non-propelled floating crane. The defendant submitted his tender on 5-1-1976 by which he offered to purchase the crane for Rs. 1,71,000/-. He deposited Rs. 1,200/- as earnest money. The tender submitted by the defendant was accepted by the plaintiff and this was communicated to him by letter dated 24-2-76 and he was requested to deposit the balance amount within 30 days of the receipt of the letter. The defendant did not respond to the letter of acceptance. The plaintiff, therefore, sent a letter to the defendant on 11-6-76 informing him that the earnest money would be forfeited and that the loss sustained would be recovered from him. The plaintiff sold the crane to one V. Veerappan of Madras for an amount of Rs. 1,23,456.77. Plaintiff sustained a loss of Rs. 47,543.23 ps. After adjusting the earnest money, the plaintiff used for the balance amount. The defendant filed written statement contending that there was no completed

contract. He contended that the tender was not accepted within 30 days as stipulated and the letter dated 24-2-76 was in the nature of a counter offer and it was not accepted by the defendant. The contract must be deemed to have terminated on 24-3-76. The letter of the plaintiff dated 11-6-76 terminating the contract was illegal. The defendant was not aware of the alleged sale, of the crane to Veerappan of Madras. There was no retendering and the crane should have been sold in open auction. Plaintiff was bound to return the earnest money deposit to the defendant. Plaintiff did not take any steps to mitigate the damages and the maintainability of the suit was challenged by the defendant.

2. The plaintiff produced series of correspondence and they are marked as Exts. A1 to A12. PW 1 was examined on the side of the plaintiff and DW 1 was examined on the side of the defendant. The court below held that there was completed contract between the plaintiff and the defendant regarding the sale of a non-propelled floating crane and the plaintiff had performed his part of the contract and the default was made by the defendant. However, the claim for damages by the plaintiff was rejected by the court below for the reason that the plaintiff did not give notice of the resale to the defendant and that the plaintiff did not take any steps to mitigate damages. The court below held that, as there was no valid resale, the plaintiff cannot complain that it had sustained loss and on these premises the suit was dismissed with costs.

3. The short question that arise for consideration is whether the plaintiff is entitled to get "damages" viz. the amount by which the contract price exceeded the resale price and the expenses for the resale. The definite contention of the respondent is that the plaintiff-appellant conducted the resale as per Section 54(2) of the Sale of Goods Act and the sale was without notice to the respondent and if there was no such notice the unpaid seller is not entitled to recover damages. On the other hand, the appellant contended that the resale was not under Subsection (2) of section 54 of the Sale of Goods Act but it was under subsection (4) of Section 54 of the Sale of Goods Act as the seller expressly reserved a right of resale in the contract.

4. In order to appreciate this distinction it may be necessary to understand the rights of unpaid seller, which are enumerated u/s 46 (1) of the Sale of Goods Act. Section 46(1) of the Sale of Goods Act reads of follows:

46. Unpaid Seller's rights --(1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods as such, has by implication of law--

(a) lien on the goods for the price while he is in possession of them;

(b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them;

3 (c) a right of re-sale as limited by this Act.

Section 46(i) (c) invests the unpaid seller with the right of resale, notwithstanding the fact that the property in the goods passed to the buyer. The mode in which the resale has to be effected is described in Section 54 of the Act. Subsection (i) of Section 54 makes it clear that mere exercise of right of lien or stoppage in transit by the unpaid seller does not rescind the contract. Subsection (2) of Section 54 says that in the case where the goods are of perishable nature or where the unpaid seller exercised his right of lien or stoppage in transit, the unpaid seller can resell the goods. The condition precedent for such resale is that the unpaid seller shall give notice to the buyer of his intention to resell and if the buyer does not pay or tender the price the seller can resell the goods within reasonable time and recover from the original buyer the damages for the loss sustained by the breach of contract. Subsection (2) of Section 54 of the Act also makes it clear that the original buyer will not be entitled to get any profit received by the unpaid seller on such resale. If the unpaid seller fails to give notice before resale regarding the proposed resale the seller is not entitled to recover damages but he is liable to pay profit if any derived on such resale. This is obviously because the unpaid seller is selling the article as an agent of the original buyer and at the time of resale the original contract is still in force. However, Subsection (3) of Section 54 clarifies the position that the buyer on such resale acquires a good title as against the original buyer, though no notice was given to him by the unpaid seller regarding the resale.

5. The learned counsel for the respondent cited the decision reported in *Hirji Barmal Vs. Bombay Cotton Ltd.*, wherein it is held that Section 54(2) does not permit an unpaid seller to exercise his right of resale without notice and if the seller does it at his own peril. The same view has been held by various decisions (See *Sundararama Iyer & Co. v. M. Mudaliyar* (AIR 1957 Madras 228) *P.S.N.S. Ambalavana Chettiar and Co. Ltd. and Another Vs. Express Newspapers Ltd., Bombay*, and *Kesava Pandurang Apte v. T.V. Krishna Iyer* (1955 KLT 201)). In all these cases the resale was u/s 54(2) of the Sale of Goods Act and the seller had no right of resale as per the original contract.

6. It is clear that Subsection (2) of Section 54 is not applicable in a case where the unpaid seller reserved his right of resale in the original contract in case the buyer makes default. Subsection (4) of Section 54 of the Sale of Goods Act states that on resale the original contract is rescinded and it is without prejudice to any claim which the seller may have for damages. Under Subsection (4) of Section 54 the seller obviously has the right of resale as against the original buyer if such a right is expressly reserved in the contract and in that event the seller need not give notice to the original buyer regarding the proposed resale as contemplated u/s 54 (2) of the Act.

7. In the instant case Clause 9 of Ext. A3 Contract provided a right of resale for the seller, which reads as follows:

If the tenderer fails to pay the purchase price as aforesaid or fails to remove the goods within the period stipulated (time being the essence of this agreement)

the contract for the purchase of goods shall stand cancelled and the earnest money and the purchase price, if any paid shall be forfeited to the Trustees without prejudice to the rights of the Trustees to recover damages on account of such breach. The goods will thereafter be resold at the sole risk and cost of the defaulting tenderer who shall be responsible for the deficit to any benefit in the event of any increase in the price arising out of such resale. The Trustees reserves the right to take such further action against defaulting as they may be authorised by law.

The above clause is explicit and clear and the seller was justified in effecting the resale without giving notice to the original buyer. Section 54 does not explain the method of exercising seller's right of resale. The seller is free to sell to anyone he chooses. But, if he acts unreasonably the doctrine of mitigation may limit the damages which he can recover from the original buyer. If the seller unreasonably sold the goods at a lower price than he should have obtained the damages from the original buyer should be the difference between the contract price and the price he ought to have reasonably obtained.

The plaintiff informed the defendant that his tender was accepted and he was requested to deposit the balance amount within 30 days. The contract was terminated by the letter dated 11-6-1976. Thereafter, the plaintiff requested the other persons who participated in the tender to keep their offer valid. The next highest bidder was one M/s. Joseph and Co., Bombay. But, they subsequently informed that they were not interested and their offer was withdrawn. The next highest bidder was M/s. Espat Traders, Bombay-10. They were prepared to purchase the crane. They only stated that the price offered by them is inclusive of customs duty. Without ascertaining the duty payable towards customs, the plaintiff sold the floating crane to V. Veerappan, who was the next highest bidder. The plaintiff should have ascertained whether the sale to M/s. Espat Traders was more profitable. It would show that the plaintiff had not taken any steps to mitigate the damages. Therefore, I hold that the plaintiff is entitled to get damages only to the extent of the difference between the price quoted by the defendant and M/s. Espat Traders, Bombay. The defendant offered to purchase the crane for Rs. 1,71,000/-. M/s. Espat Traders, Bombay offered Rs. 1,28,786/- to purchase the crane. The difference between these amounts comes to Rs. 42,214/-. Deducting the earnest money of Rs. 1200/-, the plaintiff-appellant is entitled to get Rs. 41,014/-. The appellant is also entitled to get proportionate costs. The decree amount will carry interest at 6% per annum from the date of the suit till realisation.