

(1961) 03 OHC CK 0015

In the Orissa High Court

Case No : First Appeal No's. 10 and 11 of 1957

Dhanpatram Agrwalla

APPELLANT

Vs

Jayandrayan Agarwalla and State of Orissa
 State of
Orissa Vs Jayandrayan Agarwalla and Dhanpatram Agarwalla

RESPONDENT

Date of Decision : 07-03-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Contract Act, 1872 — Section 157, 39
Forest Act, 1927 — Section 41, 43
Negotiable Instruments Act, 1881 (NI) — Section 80
Sales of Goods Act, 1930 — Section 37(1)

Citation : (1961) 27 CLT 340

Hon'ble Judges : Narasimham, C.J;R.K. Das, J

Bench : Division Bench

**Advocate : Government for Defdt. No. 1, M.S. Rao and M.K.C. Rao, for Defdt.
No. 2, for the Appellant; H. Sen, for the Respondent**

Final Decision : Dismissed

Judgement

R.K. Das, J.—These two Appeals are directed against there decision dated 13th November 1956 passed by Sri B.R. Rao,. Subordinate Judge of Bolangir in Money Suit No. 2 of 1954. T facts of the case may be briefly stated as follows:

The Plaintiff was a forest contractor in Khariar estate in the year 1950. On 16th November 1950, he was transporting 207 Mounds of Patumari fibres in 142 bales from Kantabanji Railway Station to Cossipore in Calcutta in Wagon No. 16769. According to the Plaintiff, he had valid export permit Nos. 34/31 and 34/50, dated 16th October 1950 and 18th October 1950 respectively. On the strength of the said permits he was transporting the goods by railway when the goods were seized illegally by the Range Officer, Mahakhand Forest Division, without any justification and the said goods were kept in the custody of Dhanpatram (Defendant No. 2). Ultimately the Plaintiff filed true copies of the said permits before the department and demanded the seized Petumari fibres. But when the

Plaintiff wanted to take delivery, it was discovered that Defendant No. 2 who was in charge of the goods, had already converted the said goods by replacing some fibres of inferior quality and thus the goods were no more the very same goods which were delivered to Defendant No. 2, and; as such, the Plaintiff refused to accept them. The Plaintiff made repeated demands before the forest authorities for the delivery of the goods or their price; and finally to get the same gave a notice u/s 80, CPC against Defendant No. 1 on 6th August 1953. Having failed to get back the goods or their price, the Plaintiff filed the present suit against Defendants 1 and 2 for recovery of a sum of Rs. 6210/-, being the price of 201 maunds of Petumari fibres at the rate of Rs. 30/- per maund, and also Rs; 1180/- towards interest at the rate of 6 P.C.P.A. and also a further sum of Rs 320/- as damages for worry, inconvenience and troubles caused to him. Thus in all, the total claim comes to Re. 7710/-.

2. Both the Defendants contested the suit. The case of Defendant No. 1, the State of Orissa, is that the seizure was quite lawful as transport of Petumari fibers without valid export permits is illegal and amounts to an offence under the Forest Laws as the permit was not produced on demand by the Range Officer, he seized the goods and also the criminal proceeding against the Plaintiff. After the goods were seized, according to the usual practice, they were kept in the custody of a third person, and so the goods were kept in the custody of Defendant No. 2. Defendant No. 1's further case is that in fact some of the goods, that were left in the custody of Defendant No. 2, were changed and on inspection at the time of delivery it was also found that there were 6 bales more than what was originally entrusted to Defendant No. 2, and some of the labels that were pasted on those bales were missing. So the Plaintiff refused to take delivery of the goods. There was an attempt to make an amicable settlement between the Plaintiff and Defendant No. 2 but that failed. Defendant No. 1 contended that in any event he was not liable to pay any compensation or damage to the Plaintiff as he was not responsible for the conversion of the goods of the Plaintiff.

3. Defendant No. 2, however, contended that he received those very goods and there had been no conversation or tampering by him and the very goods were offered in the same condition to the Plaintiff who refused to take the same as the price of the goods by then had fallen in the market and wanted the difference between the price at the time of delivery and the price then prevailing in the market for which, Defendant No. 2 was not agreeable. So the Plaintiff has unnecessarily filed this suit only to harass him. Defendant No. 2 is not liable for any damages. On the other hand, Defendant No. 2 had claimed his godown rent for the period the goods, after being seized, were kept in his custody. He denies any liability to pay interest.

4. The learned trial court allowed the claim of the Plaintiff at the rate of Rs. 27/- per maund prevailing at the time of seizure and thus decreed a sum of Rs. 5489/- towards the price of 207 maunds of Petumari fibers and allowed interest at 6 p.c.p.a. by way of damages from the time when the delivery was offered

and refused by the Plaintiff was wrongfully deprived of the possession of his goods even after the release from the seizure since his goods were already converted by Defendant No. 2. The interest thus came to Rs. 824/4/8 from 1-8-1951, the date of refusal of the Plaintiff, to 15-1-1954, the date of the suit. Thus the total amount, allowed by the trial Court, is Rs. 6413/4/8. He rejected the Plaintiff's claim of Rs. 320/- as damages for worry, inconvenience and troubles. He passed this decree against both the Defendants and directed the same to be paid within two months from the date of signing of the decree, failing which the case will be reported to the State Government for orders. He also allowed future interest at the rate of six percent per annum and also costs of the suit.

5. Against this decision of the learned Subordinate Judge, Defendant No. 2 has tiled F.A. 10/57 against the Plaintiff and the State of Orissa as Respondents 1 and 2 respectively. A cross appeal has also been filed by the Plaintiff in respect of the amount of Rs 621/- of his claim which has been disallowed by the learned Subordinate Judge. Against the same decision also the State of Orissa has filed F. A. 11/57 against the Plaintiff and Defendant No. 2 as Respondents 1 and 2 respectively, challenging the decree passed against the State of Orissa. On these appeals are directed against the same judgment and have been heard and legally. This judgment will cover both the appeals.

6. It was contended by the learned Government Advocate, appearing for the Defendant No. 1, the State of Orissa, that the goods of the Plaintiff were seized in accordance with law as the Plaintiff failed to produce valid export permits before the Range Officer, and, as such, the State of Orissa cannot be held liable for any damages at all; that as soon as he permits were produced, the seized goods were released for delivery to the Plaintiff, but he refused to take back the same on the ground that his goods had been tampered with by Defendant No. 2; under such circumstances Defendant No. 1 cannot be made liable for any damages as he was not a party to any such conversion; that assuming the Plaintiff is entitled to get damages, he cannot claim the same on the basis of the price as prevailing on the date of seizure (16-11-1960) but on the date of offer (1-8-1951); that Defendant No. 2. In whose custody the goods were kept after seizure) and not Defendant No. 1 is liable to pay damages, if any, to the Plaintiff; and that the Plaintiff is not entitled to any interest as claimed in the suit.

7. Mr. Rao, appearing for Defendant No. 2 Appellant, contended that there was no tampering of the seized goods at all and Defendant No. 2 was always ready to give delivery, but the Plaintiff refused to take back the same as the price of the said goods had fallen by then. He further contended that the Plaintiff should have taken delivery of all such goods which were admittedly his, and he having failed to do so, he cannot bring the suit for recovery of the price of the entire stock of goods; and the Plaintiff's case being one of conversion, his suit must be dismissed as he had failed to prove how much of his goods had been converted by Defendant No. 2.

8. Mr. Sen, the learned advocate for the Plaintiff-Respondent, however, urged that the Plaintiff was entitled to refuse to take delivery of the entire stock even if Borne of his goods were found to be tampered with and he is entitled to a decree for the price of the goods at the rate prevailing at the time of the seizure and he is also entitled to interest by way of damages.

9. To prove their respective cases, some witnesses have been examined by the Plaintiff including the Plaintiff himself (p.w. 5). The State of Orissa is examined Sri D. Ramdas, the Ranger who seized the goods. Defendant No. 2 bag examined some witnesses including himself (d.w. 3). Some letters and other papers have also been filed in the case. The oral evidence relates mostly to the condition of the Petumari fibers as existed at the time of offer for delivery. Evidence was led by the Plaintiff regarding the price in the market at which he purchased the seized goods.

10. Let us examine the evidence of the case in the light of the contentions raised by the learned advocates for the parties. The Plaintiff happens to be a contractor of forest produce of the Khariar estate as appears from the agreement dated 14-11-1948 (Ext. 4). Similarly Defendant No. 2 is a contractor of forest produce as would appear from agreement dated 15-11-1949 (Ext. 30). Kantabanji Railway Station is near about the field of operation of Defendant No. 2. When some Petumari fibres were being transported at the Kantabanji Railway Station, Defendant No. 2 suspected that the Plaintiff probably had removed some Petumari fibres from his area and was despatching the same to Calcutta without a valid permit. So he made a complaint to the Range Officer on 16-11-1950 (Ext. 28). On receipt of the said complaint, the Forest Ranger, Sri D. Ramdas, witness No. 1 for Defendant No. 1 (the State of Orissa), came to the railway station and demanded permit in respect of t goods that were proposed to be sent by railway, and on the non-production of the said permit he seized the same on that day and as despatch of the goods was without a valid permit he started a proceeding for an offence under the provisions of Forest Law, the offence report being No. 261 Kantabanji dated 16-11-1950 (Ext. 25). He also after seizure of the goods, kept the goods in the custody of Defendant No. 1 and took a receipt (ext. 31) dated. 18-11-1950 from Defendant No. 2 The receipt (ext. 31) reads as follows:

Received 142 bales (one hundred forty two bales) weight 207 mds. (Two hundred and seven mds.) of Peiumari fibres on custody in moistured condition from the Range Officer Mahakhand. I shall produce the said petumari whenever will be required by the Government. Sd/-D. R. Agawalla. 18-11-1970.

After this seizure was made, the Plaintiff, it appears, made "an application to the Range officer on 13-4-1971 Ext. 12 stating that the original export permits were not available and in the absence of the original export permits, certified copies of the permits are enclosed with the letter and on the strength of the same the goods may be released. In another letter dated 6-6-1951 addressed to the Range Officer, Mahakhand Range, he also made a similar request. It appears, that thereafter Sri Ramdas, Forest Range Officer, reported the position to the

D.F.O, who finally issued orders for release of the said bales of Petumari fibres, and then the Range Officer directed Dhanpatram (Defendant No. 2) to give delivery of the said goods to the Plaintiff. On 29-7-1951 the Range Officer submitted a report (Ext. 15) to the D.F.O. stating that Dhanpatram had removed the labels from some of the bundles that were pasted at the time of seizure and in some cases he had removed labels from the old bundles and pasted them on new ones, and some of the bundles were found to be loose and there were some more bundles than what was kept at the time of seizure. Moreover he had removed the goods from the godown where they were originally stacked. His report would, therefore, clearly show that so far as Dhanpatram is concerned, he had substantially tampered with the goods that were originally entrusted to him on 18-11-1950. By the another report dated 30.8-1951 (ext. 18) he also informed the D.F.O. that as Dhanpatram had failed to hand over the real seized goods, legal action should be taken against him. In a letter dated 22-9-1951 (ext. 15/a), the Plaintiff informed the Range Officer that the seized goods had been converted and mixed with Sial pat and Gihdula fibres which are of inferior qualities to Petumari fibres. Thereafter, on 4-10-1951 by a letter (Ext. 20) the D.F.O. informed Dhanpatram that if he would fail to deliver the real seized Petumari fibres within a month, legal action should be taken against him. In reply Dhanpatram by a letter dated 29-11-51 (Ext. 21) informed the D.F.O. that the Plaintiff had refused to take delivery and that he was prepared to give some selected goods as he himself is a Petumari contractor, but the Plaintiff wanted compensation of Rs. 3000/- as the market price had gone down. The D.F.O. wanted to make a settlement between the Plaintiff and Defendant No. 2 but obviously failed. Thereafter Plaintiff having failed to get back his goods or equivalent price he filed the present suit on 15-1-1954 after giving due notice u/s 80, Code of Civil Procedure.

11. It appears from the evidence of Ramdas, d.w. 1 for the State of Orissa, and it is also the admitted position, that the export permit was not shown at the time of seizure on 16-11-1950 and that the transport of such goods without a valid permit was not permissible at the time. The original permits were never shown to the Range Officer and it was only the true copies of such permits that were produced before the forest authorities about 6 months after the seizure. Therefore there was no doubt about the fact that the seizure made on 16-11-1950 was perfectly legal and was made under the provisions of the Indian Forest Act. An offence report, as stated above, was also made by the Range Officer against the Plaintiff in due discharge of his duties. The question now would be whether the State of Orissa (Defendant No. 1) can be held responsible for any loss or damage arising out of such seizure. Section 43 of the Indian Forest Act, 1927, lays down:

The Government shall not be responsible for any loss or damage which may occur in respect of any timber or other forest produce while at a depot established under a rule made u/s 41, or while detained elsewhere, for the purposes of this Act, and no Forest Officer shall be responsible for any such loss

or damage, unless he, cause loss or damage negligently, maliciously or fraudulently.

It is not disputed that on the date of the seizure, export of Petumari fibres without a valid permit was illegal. There is, therefore, no doubt about the fact that the goods were detained in accordance with the provisions of the Forest Act, and the Range Officer did not act with any malafide intention. The said Range Officer is also not a party to the Emit. That being the legal position, the State of Orissa cannot be held liable for the seizure or detention of the goods as alleged by the Plaintiff.

12. It is admitted that after the seizure, the goods were kept in the custody of Defendant No. 2 to be released when the Plaintiff is able to produce a valid permit. As I have already stated, the Plaintiff sent letters accompanied with true copies of report permits to the forest authorities who then directed that the goods be released to the Plaintiff. In the meanwhile, it appears.

Defendant No. 2 had tampered with the goods that were entrusted to him, as would appear from the goods that were entrusted to him, as would appear from the evidence of d.w. 1 for the State as also from the evidence adduced on behalf of the Plaintiff, and thus he is responsible for the present; suit. Sri Ramdas has stated in evidence that he found that the labels of some of the seized goods were missing and found that some labels were lying on loofah bundles and that there were some 5 more bundles than what were actually seized and delivered to Defendant No. 2. Moreover the bales were not in the godown where they were originally kept but in another godown when the delivery was offered. So the Plaintiff gave in writing refusing to take delivery of such goods. Thus it is clear from the oral evidence of the Range Officer d.w. 1 for the State and also from the reports Exts. 15 and 18 that there was tampering by Defendant No. 2 in respect of the good of the Plaintiff. The evidence, however, is not clear as to how many bundles were actually tampered and how many remained in tact and just in the same condition in which they were seized. The position would have been more clear and decisive if, in fact evidence would have been led to the effect as to what exactly was the number of bales or the quantity of goods which had been tampered by Defendant No. 2. But all the same it is well proved that at least quite a number of these bales had been tampered with by Defendant No. 2 while they remained in his custody.

13. The question, therefore, would be in view of such state of affairs, can the Plaintiff be compelled to take the goods as offered by Defendant No. 2 in other words, whether his refusal to take delivery of the entire stock of goods is justified. It was contended by Defendant No. 2 that assuming that some of the goods of the Plaintiff had been mixed up with his own goods or other goods, and since the Plaintiff's goods are separable, the Plaintiff was bound to take back the goods which were undoubtedly his and might have rejected only the others which were not his, and in that event, the Defendant No. 2 might have been held liable to compensate the Plaintiff who refused to accept the entire stock of goods,

Defendant No. 2 is not liable for any compensation at all., In this connection, Section 157 of the Indian Contract Act may be seen:

If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods; in such manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

In this case, it is clear that Defendant No. 2 has mixed his own goods with the seized ones, has also tampered with the goods of the Plaintiff, has added some more bales and has changed the labels from some of the bundles. Thus evidently the onus was on Defendant No. 2 to bring in evidence as to what exactly was the quantity of goods or number of bales that was in the original condition so that the Plaintiff was bound to accept the same. It was he who should have borne the expenses of separation and, in any event, is also liable for any damage arising due to mixture. Defendant No. 2's case is one of denial of any tampering or mixture of his own goods with those of the Plaintiff. In this connection we may notice the provisions of Section 39 of the Indian Contract Act which provide:

When a party to the contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless: he has signified, by words or conduct, his acquiescence in its continuance. In this case, as it appears, Defendant No. 2 failed to deliver the entire stock of the seized goods to the Plaintiff in the original condition, and, on the other hand, offered some goods which were not of the Plaintiff. In that event, it can be well said, on the basis of this legal position, that the Plaintiff had full discretion to refuse to accept even a part of the goods as offered by Defendant No. 2. In this connection also the principles of law laid down in Section 37(1) of the Sales of Goods Act may be seen which provide:

Where the seller delivers to the buyer quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

The legal position is, therefore, clear that the Plaintiff having found that the goods had been tampered with and some of his goods were missing from the stock, he had every justification in refusing to accept them in toto and he was not bound to accept even a part of his goods and the option was his, and therefore the Plaintiff was justified in refusing to accept the goods as offered to him when he wanted to take delivery. Defendant No. 2, therefore, is bound to compensate the Plaintiff for the loss or damage to his goods. He knew the goods belonged to the Plaintiff though formally entrusted by the Forest Ranger after the seizure. He sold the goods without due notice to the parties. Moreover the State of Orissa was not in any way benefited by the transaction. We, therefore, hold that Defendant No. 1 is not liable to pay any compensation to the Plaintiff and it is Defendant No. 2 who alone is liable to pay compensation to the Plaintiff on account of the goods that were delivered to him on 18-11-1950.

14. The question, therefore, is at what rate this compensation is to be assessed. I have already held that the seizure was perfectly legal. The learned Subordinate Judge was, therefore, wrong in calculating the damages on the basis of the price prevalent at the time of the seizure. The Plaintiff produced the true copies of the valid permits but refused to take delivery sometime in September 1951 when the goods were offered to him for delivery, on the ground that his goods had been mixed up and tampered. So the Plaintiff is entitled to compensation only on the basis of the rate prevalent at the time when the goods were offered to him in September 1951. The question then would be what was the price that was prevailing at the time when the delivery was offered and refused by the Plaintiff. The learned Subordinate Judge obviously was wrong when he allowed the Plaintiff's claim at Rs 27/- per maund on the basis of the price prevailing at the time of seizure. The only price that can be taken into consideration is that prevailing on the date of the offer of delivery sometime in September 1951. The evidence on the side of the Plaintiff is not very satisfactory and moreover the price appears, to be very high when he claims at the rate of Re. 30/- per maund. There is no evidence worth the name from his side as to the rate prevailing at the time of offer of the goods to him. On the side of the Defendants, Defendant No. 2 has himself stated that Rs. 14/- per maund was the market price at the time when the goods were offered to the Plaintiff. That appears to be low, and it is not improbable that he would put the price at that level knowing fully well that he has to compensate the Plaintiff. In our opinion, it would be quite reasonable to fix the price of Petumari fibres at Rs. 18/- per maund at the time when delivery was offered to the Plaintiff. This estimate of the price gains corroboration from the evidence of some of the witnesses for the Plaintiff himself. Thus p.w. 1 admitted in cross examination that the price of Kendula and Sialpat was Rs. 8/- to Rs. 10/- per maund in August 1951. P.w. 2 further admitted that the difference in price between Petumari on the one hand and Sialpat on the other will be Rs. 10/-. Thus if the evidence of these two witnesses (p.w.s. 2 and 4) is read together, the price of Petumari in August 1951 would be Rs. 18/- to Rs. 20/- per maund. Hence our estimate of Rs. 18/- per maund may be taken as fairly accurate. We would accordingly modify the order of the learned trial Court and allow the Plaintiff to recover from Defendant No. 2 at the rate of Rs. 18/- per maund for 207 maunds, that is, a sum of Rs. 3726/- towards the price of his seized goods.

15. The next question is whether the Plaintiff is entitled to any interest by way of damages on account of the seizure and detention of his goods. In support of the claim for damages, Mr. Sen, appearing on behalf of the Plaintiff, relied upon a decision reported in *Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI)*, where their Lordships have held:

It is well settled that on action for wrongful detention the Plaintiff is entitled besides the re-delivery of the chattel or payment of its value in the alternative, also to damages for such wrongful detention. There is however no definite criterion laid down by the decided cases as to what the measure of such

damages should be.

In that case the Appellant Dhian Singh entered into all agreement on May 4, 1942 with the Union of India for hiring two trucks to the Union of India for imparting tuition to the military personal and it was stipulated that the charge for such hire would be Rs. 17/- per day and the agreement was terminable on one month's notice by either side. On June 29, 1942 the Union of India gave notice to the Appellant terminating the agreement with effect from 1-8-1942 and asked the Appellant to remove the two trucks on the expiration of that period. The Appellant thereupon attended upon the Officer Commanding on 1-8-1942 for removing the trucks which were neither delivered to him nor the hire charges were paid for the trucks. Thereupon the Appellant filed a suit claiming inter alia damages at the contracted rate of Rs. 17/- per day from 1-8-1942 till delivery of possession. Their Lordships held that in addition to the amount of the value of the trucks, the Appellant was entitled to recover such damages from the Respondent (Union of India) at the rate of Rs. 17/- per day from 1-8-1942 till 7-7-1944, the date of the trial Court decree. The facts of that case are entirely different and the rule laid down in that case has no application to the present case. Here there was no stipulation between the parties as to when exactly the goods were to be re-delivered to the Plaintiff or any damages contemplated between them; on the other hand the forest authorities made the seizure as the transport of Petumari fibres was being done without a valid permit and such an act amounted to an offence under the forest laws.

In this connection the well known authority on the question of interest reported in AIR 1938 67 (Privy Council) was cited Mr. Rao on behalf of Defendant No. 2. Their Lordships of the Privy Council, while dealing with the question whether the Court has authority to allow interest for the period prior to the institution of the suit-held:

Interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of Law, or under the provisions of any substantive law entitling the Plaintiff to recover interest as for instance u/s 80 of the Negotiable Instruments Act.

In the present case, there is no question of any agreement or payment of Interest, nor is such interest allowable under any provisions of law or usage of trade. It is, therefore, clear that so far as interest prior to the institution of the suit is concerned, the Plaintiff is not entitled to any interest by way of damages as granted by the Court below. The interest allowed for the period prior to the institution of the suit by the Court below must therefore be set aside. The Plaintiff shall however be entitled to pendent lite and future interest at six per cent.

16. The result, therefore, is that the decree passed by the learned Subordinate Judge is modified in the manner stated above and the Plaintiff shall be entitled to

get a decree for a sum of Rs. 3726/- against Defendant No. 3 with pendente-lite and future interest at the rate of six (6) percent per annum. F.A. 10/57 is therefore partly allowed and the cross objection filed by the Plaintiff is rejected. F.A. 11/57 is allowed in full and the Plaintiff's suit, as against Defendant No. 1, the State of Orissa, is dismissed. In the circumstances, the parties are to bear their own costs throughout.

Narasimham, C.J.

17. I agree.