

(2005) 12 BOM CK 0038

In the Bombay High Court

Case No : Summons for Judgment No. 414 of 2005 in Summary Suit No. 1499 of 2004

Divyesh K. Kothari

APPELLANT

Vs

Aatam Gems and Others

RESPONDENT

Date of Decision : 22-12-2005

Acts Referred:

Sales of Goods Act, 1930 — Section 24

Citation : (2006) 2 ALLMR 391 : (2006) 4 BomCR 471 : (2006) 2 MhLj 744

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : M.M. Vashi, for the Appellant; I.P. Bagaria, for the Respondent

Judgement

S.J. Vazifdar, J.—This suit is filed to recover a sum of Rs 25,67,850/- together with interest at 18% p.a. from the date of filing of the suit till payment.

2. Defendant Nos. 2, 3 and 4 are the partners of defendant No. 1.

3. The plaintiffs case is that on 16th February, 2001, defendant No. 3 represented to him that his overseas clients were interested in buying diamonds of specified qualities and quantities. Defendant No. 3 further represented that the diamonds were required for inspection and examination by the prospective purchasers.

4. Pursuant thereto the plaintiff handed over to the defendants eight diamonds of different qualities. The diamonds were forwarded along with writings titled "ACKNOWLEDGMENT OF ENTRUSTMENT". In the trade they are known as "Jangad" notes. The eight diamonds were forwarded under three identical Jangad notes which also specified the value of the diamonds in Rupees per carat. The Jangad notes dated 20th February, 2001, 22nd February, 2001 and 22nd February, 2001 were in respect of five, two and one diamond, respectively of different qualities/carats. The aggregate value of the diamonds under the three Jangad notes is the claim in suit.

5. The suit is based on the said Jangad notes. No reported judgment on the maintainability of a summary suit on such Jangad notes has been cited. It is necessary therefore to reproduce the entire Jangad notes. The Jangad notes are not well worded and contain words which are spelt incorrectly, but the essence thereof is clear. They read as under :--

ACKNOWLEDGEMENT OF ENTRUSTMENT

Goods received for Manufacturing/Inspection/Showing to intending Purchasers as per condition mentioned herewith I hereby acknowledge receipt of the goods as mentioned here with which you have entrusted to me/us, which We/I hold in trust for the following purpose and on following conditions.

1) The goods have been entrusted to me for Manufacturing for being shown so intending purchasers inspection.

2) The goods have remain your property and I/We acquire on right to property or interest in them till a sale note signed by you in passed or till the price is paid in respect thereof notwithstanding the fact that mention is made of rate or price in the particulars of goods herein set forth.

3) I/We agree not sell or pledge or mortgage or hypothecate or otherwise deal with them in any manner till a sale not signed by you is passed or the price is paid to you.

4) The goods are to be returned to you forthwith when demanded back.

5) The goods will be my/our risk in all respect till the goods are returned to you. I am responsible to you for the return of the same goods in the same condition as I/We have received/after making them.

6. The plaintiffs case is that in April, 2001, the defendant informed him that the diamonds were sold to their client. The plaintiff further stated that two cheques of the sum of Rs. 1,75,000/- and Rs. 71,353/- were issued towards part payment. Both the cheques were dishonoured. Thereafter, the defendant avoided the plaintiff as well as payment under the Jangad notes.

7. The plaintiff by his advocate's notice dated 24th January, 2004 demanded payment. The suit was filed on 6th February, 2004. The mere fact therefore that the defendant did not reply to the plaintiffs advocate's notice dated 24th January, 2004 cannot be held against the defendants.

8. Two defences have been raised. It was contended that the diamonds had been returned by defendant No. 3 a partner of defendant No. 1 to the plaintiff. It was also contended that the suit is not maintainable as a summary suit.

9. I am not inclined to accept the first defence for more than one reason. The aggregate value of the diamonds was over Rs. 25,00,000/-. The entrustment thereof was evidenced in writing in the form of the Jangad notes. It is difficult to believe that goods of this value were returned without any receipt thereof being

demanded by the defendant. It is not the plaintiffs case that it was the usual practice either of the trade or between the plaintiff and the defendants to return diamonds without receipts acknowledging the same.

10. Moreover defendant No. 3 has not filed an affidavit in reply. Defendant No. 2 has filed an affidavit in reply stating that defendant No. 3 returned the diamonds. It is pertinent to note that defendant No. 2 has not even stated when defendant No. 3 returned the diamonds.

11. Further as far as the dishonour of the cheques is concerned, the defendants have stated in their affidavit in reply that, as the diamonds were returned to the plaintiff, the cheques were not required to be honoured. The explanation is entirely unsatisfactory. The cheques were dishonoured in the year 2001. Surely, had the diamonds actually been returned, the defendants would have protested in writing the deposit of the cheques by the plaintiffs. They did not do so.

12. These facts lead to the irresistible conclusion that the defendants had not returned the diamonds to the plaintiff.

13. This brings me to Mr. Bagaria's submission that the suit, based as it is on the Jangad notes is not maintainable as a Summary Suit. According to Mr. Bagaria, the notes contain neither an express nor an implied obligation on the part of the defendants to pay the plaintiff the value of the diamonds mentioned therein even if the same are not returned. In fact, he submitted, the Jangad notes do not even evidence a sale of the diamonds by the plaintiff to the defendant. In this regard he relied upon Clause 2 of the Jangad Notes under which the goods remained the plaintiff's property and the defendants were to acquire no right therein, till a sale note signed by the plaintiff, was passed or till the price was paid in respect thereof. Admittedly, the price has not been paid. The formal sale note was not issued either. Therefore, according to Mr. Bagaria, there was no sale.

14. Mr. Bagaria's contention is not well founded. The suit is maintainable as a Summary Suit, both on the facts of this case and in law.

15. In the present case, the sale was in fact completed, as contended by the plaintiff in paragraph 4 of the plaint. This is evidenced inter-alia by the said two cheques issued by the defendant towards part payment. I have already rejected the defendant's case of their having returned the diamonds and their contention in respect of the cheques and the dishonour thereof. That the plaintiff considered the diamonds sold is admitted.

16. Clause 2 is for the plaintiffs protection. This is clear from a conjoint reading of Clauses 2 and 4. If the parties confirm or are deemed to have confirmed the sale otherwise than in the manner specified in Clause 2, the defendant cannot be permitted to contend to the contrary merely because the sale was otherwise than as provided in Clause 2.

17. In this view of the matter, I do not think it necessary to consider the applicability of Clause (b) of Section 24 of the Sale of Goods Act, 1930 to a

Jangad note,

18. In any event in the facts of this case the plaintiff is entitled to the claim in suit, even assuming there was no sale as contemplated by the Jangad Notes. Mr. Bagaria's contention here is that if there was no sale the suit is not maintainable as a summary suit.

19. The submission is not well founded. Clause 5 of the Jangad notes contain an implied obligation on the part of the defendant to pay the price of the diamonds which are the subject matter thereof. That a Summary Suit is maintainable on an implied obligation to pay a debt or liquidated demand in money when they arise on a written contract is well settled. (See *Manekchand Mohanlal Poonawalla v. Shah Bhimji Kundanmal* 1969 Mh.L.J. 698 : (1969) 71 BLR 370 and *Sun N Sand Hotel Limited Vs. V.V. Kamat, HUF*, . The latter judgment was confirmed by the Division Bench of A. P. Shah and D. K. Deshmukh, JJ. in Appeal No. 313 of 2003).

20. Under Clause 5 of the Jangad Notes, the defendants have expressly agreed that the goods would be at their risk in all respects till the goods were returned to the plaintiff. It is further provided that the defendants are responsible to the plaintiff for the return of the goods. I would readily infer in Clause 5 an implied obligation to pay the value of the goods in the event of the same not being returned. Surely, it cannot be suggested that the defendant is entitled to keep the goods and not pay for the same. For otherwise what is it that is to be at the defendants' risk and in the absence of the goods/diamonds, what is the defendants to be responsible for? The only logical thing in the absence of the goods is the value thereof. This is the only reasonable and commercially acceptable interpretation that one can ascribe to Clause 5. To accept Mr. Bagaria's contention would render Clause 5 otiose.

21. Nothing I have said here reflects on the right of the plaintiff to demand the return of the goods that are delivered under such notes till the sale is complete or treated by the parties to be complete. For instance, if the sale is not complete, the plaintiff may well be entitled to the protection of Clause (2) and thereby entitled to demand the return of the goods. Thus, for instance, if in such a case the plaintiff claims the return of the goods and not the price thereof, it may be open to the plaintiff in an appropriate action to claim the value of the goods on the date of demand thereof. It is not necessary to deal with these questions in the present case.

22. In the circumstances, there is really no defence to the suit.

23. It was submitted that the defendant No. 4 is not a partner of defendant No. 1. It is not necessary to decide that issue at this stage. As agreed by counsel, it will be open to the plaintiff to execute the decree if any, against defendant No. 4 in the event of it being established in the execution proceeding that defendant No. 4 was at the material time a partner of defendant No. 1.

24. In the circumstances, Leave to defend granted to defendant Nos. 1 to 3

conditional upon the defendant depositing in this Court a sum of Rs. 25,67,850/- within 12 weeks from today.

25. In the event defendant Nos. 1 to 3 deposit the amounts as aforesaid, the suit to stand transferred to the list of Commercial Causes. The defendants to file their written statement within 30 days. Discovery and Inspection within four weeks thereafter. On the said deposit being made the Prothonotary and Senior Master to invest the same in any Nationalised Bank initially for a period of two years and thereafter for like periods of two years each.

26. In the event of defendant Nos. 1 to 3 failing to deposit the aforesaid amounts, liberty to the plaintiffs to apply for further orders.

27. Summons for Judgment stands disposed of accordingly.