

(1962) 08 BOM CK 0033
In the Bombay High Court
Case No : First Appeal No. 150 of 1959

Eastern Mining Contractors (Private) Ltd.	APPELLANT
Vs	
The Premier Automobiles Limited	RESPONDENT

Date of Decision : 11-08-1962

Acts Referred:

Sales of Goods Act, 1930 — Section 16

Citation : (1963) 65 BOMLR 183 : (1963) MhLj 164

Hon'ble Judges : Wagle, J;Patel, J

Bench : Division Bench

Judgement

Patel, J.—His Lordship after stating the facts of the case and matter not relevant to the report, proceeded. The next question is of liability. The respective liabilities of the dealer and the manufacturer are two entirely different matters and have to be dealt with, separately ; of the dealer it is under the Sale of Goods Act, and of the manufacturer, if at all, in tort. It is first necessary to take up the question of the dealer's liability.

2. The appellant relies upon Section 16(1) and (2) and respondent No. 2 relies upon the proviso to Sub-section (1) for excluding his liability. The section is:

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 purposes:

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any

particular purpose.

(2)Where the goods are brought 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:

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

3. This section corresponds to Section 14 of the English. Sale of Goods Act, 1893. It enunciates the well-known rule of caveat emptor and formulates exceptions necessitated by the requirements of the times.

4. For a case to fall within Sub-Section (7) it is clear that the purchaser must make known to the seller the particular purpose for which he buys the goods and must rely on the judgment and skill of the seller for the selection of the article. That the section can apply even to specific goods sold at the counter provided that the purchaser relies upon the skill and judgment of the seller is illustrated by *Wallis v. Russell* [1902] 2 I.R. 585 where fresh crabs were sold and by *Priest v. Last* [1903] 2 K.B. 148 where hot-water bottle was sold. in this case *Collins M.R.* said (p. 153):

?in a case where the discussion begins with the fact that the description of the goods, by which they were sold, points to one particular purpose only, it seems to me that the first requirement of the sub-section is satisfied, namely, that the particular purpose for which the goods are required should be made known to the seller?. The sale is of goods which, by the very description under which they are sold, appear to be sold for a particular purpose.

See also *Grant v. Australian Knitting Mills Ltd* [1936] A.C. 85. The section, therefore, would apply to the sale of specific things at the counter. It is also not necessary that the purpose for which, an article is purchased must be expressly communicated to the seller. Sub-section (1) of Section 16 clearly includes the purpose being made known by implication. Moreover, the reliance by the purchaser on the skill and judgment of the seller may even be inferred from the communications by the purchaser of the particular purpose for which the goods were purchased and need not be supported by positive evidence: see *Manchester Liners Ltd. v. Rea Ltd* [1922] 2 A.C. 74.

5. In the present case, the evidence shows that it was known that the car was required for use in the Nagpur district where summer temperature was high. The conversation as deposed to by Thakar shows that Modi said that the car had fine performance and it seems to us that in substantial measure the plaintiff has relied upon this statement of Modi. Even if we must accept that to some extent the plaintiff also relied on *Eduljee*, even so, Section 16 will apply, for, it is not, necessary that he must exclusively rely on the skill and judgment of the defendant": see *Lord Sumner in Medway Oil and Storage Co. v. Silica Gel Corporation* (1928) 33 Com. Cas. 195. The case would, therefore, fall within Sub-

section (1).

6. It is, however, argued that the defendant's liability is excepted under the proviso since the sale was of the specified article under its patent or trade name. The evidence shows that the car was not ready for delivery when the contract was made. It was clearly bought by description. In this connection, it is necessary to refer to *Baldry v. Marshall* [1925] 1 K.B. 266 in which case the plaintiff ordered a car telling the defendants that he wanted a comfortable car suitable for touring purposes. The defendants recommended a "Bugatti Car", saying that it would meet the requirements and showed the plaintiff a specimen. The plaintiff then placed an order. It was held by the Court that the requirement that the car should be comfortable and suitable for touring purposes was a condition and not a warranty and, that on the principle of *Wallis Son & Wells v. Pratt Haynes* 1911 A.C. 394 the implication of that condition was not excluded by the terms of the contract. Construing Section 14(7) of the English Sale of Goods Act, 1893, corresponding to Section 16(7) of the Indian Sale of Goods Act, it was said:

The mere fact that an article is sold under its trade name, in the sense that the trade name forms part of the description of the thing sold, does not necessarily bring the case within the proviso to Section 14, Sub-section (2), so as to exclude the implication of the condition of fitness. If the buyer, while asking to be supplied with an article of a named make, indicates to the seller that he relies on his skill and judgment for its being fit for a particular named purpose, he does not buy it "under its trade name" within the meaning of the proviso;...

7. Cases where the proviso may apply are illustrated as where a man, goes to a medicine shop and buys a particular medicine known, by a trade name. In conversation he might tell the chemist the purpose for which the medicine is purchased ; but that does not mean that he asked him whether the medicine was suitable and the chemist replied that it was so. But the present case is different. The order was placed for a Dodge car on an assurance that its performance was fine coming from a dealer in Nagpur. In the very purchase there is a condition that it is what it purports to be and the proviso cannot apply, for, it cannot be inferred that the purchaser relied upon his own judgment and not that of the seller. The proviso, in our view cannot apply in cases where there is express representation as in the present case, for it deals with cases "of express or implied information of the purpose for which the article is to be used, showing reliance upon the skill and judgment of the dealer.

8. Apart from this, Sub-section(2) of Section 16 in any case is applicable. Defendant No. 2 deals in cars and particularly cars etc. manufactured by defendant No. 1 company. The car in question has been bought by description though it has got a trade name since what was purchased was a car of the quality generally implied, in the trade name attached to it and the knowledge that it was to be used in Nagpur. As there is no proviso similar to that in Sub-section (7) in this sub-section, there is an implied warranty that the article is

merchantable unless the buyer has examined the goods and even then only if the defect were discoverable. The words of the proviso show that defects in manufacture may make the article non-merchantable; merchantable does not mean saleable. In *Grant v. Australian Knitting Mills Ltd* [1936] A.C. 85. the Judicial Committee said (pp. 99-100):

Whatever else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination: that is clear from the proviso, which shows that the implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make. A thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woollen under-garments, a hot-water bottle, a secondhand reaping machine, to select a few obvious illustrations.

What the plaintiff bought was a "car" and it contract at least be capable of use as any other car in the district. There being a latent defect which could not have been discovered by examination, it could be rejected.

9. As to the liability of defendant No. 1, it is clear from the evidence and from the contract that there was no privity of contract between the plaintiff and defendant No. 1. It was sought to be suggested on behalf of the plaintiff that defendant No. 2 was the agent, of defendant No. 1. It is clear, however, from the terms of dealing between defendant No. 1 and defendant No. 2 defining dealer's rights that defendant No. 2 cannot be regarded as an agent of defendant No. 1. The liability of defendant No. 1, therefore, cannot be in contract; its liability can only be in tort. The liability can only be on the ground of negligence since if want of good faith in defendant No. 1 is established, it may amount to fraud or cheating. To succeed on this ground, the defendant must owe a duty to the plaintiff, a breach of it and consequential damage, for merely on the ground of negligence it would not be liable unless there be duty of care owed to the plaintiff.

10. So far as this branch of the law is concerned, it consists mostly of decided cases. The limits within which reliefs may be granted are not defined since the law "has grown up behind a screen of legal procedure." Until recently it was doubtful if a manufacturer could be held liable, for injury caused to a consumer if the defective articles were sold through retailers. The principles of the liabilities of the manufacturer have been emphatically stated in the majority decision in *Donoghue v. Stevenson* [1932] A.C. 562. It also reveals the sharp cleavage in judicial opinions as illustrated by the views expressed by Lord Buckmaster and by Lord Atkin. The appellant in that case drank a bottle of ginger beer given to her by a friend. The beer was contained in a sealed opaque bottle and was manufactured by the respondent. It contained the decomposed remains of a snail in it. As a consequence of the consumption of the beer, she suffered from shock

and gastro-enteritis. She commenced proceedings against the manufacturers. She was appellant before the House. Lord Buckmaster, after stating the general principle in the words of Lord Simmer in the case of *Blacker v. Lake and Elliot Limited* (1912) 106 L.T. 533 that

“the breach of the defendant's contract with A. to use care and skill in and about the manufacture or repair of an article does not of itself give any cause of action to B. when he is injured by reason of the article proving to be defective

says that (p. 569)

From this general rule there are two well known exceptions: (1) In the case of an article dangerous in itself; and (2) where the article not in itself dangerous is in fact dangerous, by reason of some defect or for any other reason, and this, known to the manufacturer.

As to *George v. Skivington* (1869) L.R. 5 EX. 1 and *Heaven v. Pender* (1883) 11 Q.B.D. 503, on which the appellant relied, he said

“it is, in my opinion, better that they should be buried so securely that their perturbed spirits shall no longer vex the law.

and expressed the opinion that the appellant had no case. On the other hand, Lord Atkins says (pp. 582-3):

“There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises.

But in the class of case now before the Court I cannot conceive any difficulty to arise, A manufacturer puts up an article of food in a container which he knows will be opened, by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed up with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House? I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

The learned Lord then, analysed the position in English law and came to the conclusion that (p. 599):

“a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a

duty to the consumer to take that reasonable care.

This case clearly defined the duty which a manufacturer owes to the consumer provided that the article reached the consumer in the same state in which it was manufactured.

11. Negligence is a question of fact which must be proved by the plaintiff as any other fact. But in some cases the defect itself may furnish the proof. In *Grant v. Australian Knitting Mills Ltd* [1936] A.C. 85, the appellant before the Privy Council purchased a woollen garment from the retailers. There was presence of excess sulphites in the garment which, it was found, had been negligently left in it in the process of manufacture. As a result of this, the appellant contracted dermatitis. The manufacturers were held liable. Evidence was led to show that the method of manufacture was correct and the danger of excess chemical being left was guarded against and it was intended to be fool-proof. The Privy Council said (p. 101):

The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defect taken in connection with all the known circumstances:

If it was shown that all cars of this company and or cars of other companies suffered from the defect complained of, possibly negligence could have been disproved. Even in respect of the cars manufactured by this company only a few suffered from this defect. It must, therefore, appear that someone at some stage left something undone or did it improperly and was, therefore, negligent.

12. Mr. Phadke contended in the first instance that if the case is now to be argued on the basis of tort, there must be sufficient allegations in the plaint of the existence of a duty on the part of defendant No. 1 as manufacturers to the plaintiff and its breach. According to the learned counsel, such an allegation is materially absent. We do not think that the facts alleged do not make out a case of negligence. Negligence is an inference to be drawn from facts and they are sufficiently alleged in the plaint. As to the duty of the manufacturer, no doubt there is no specific allegation as such but that also is implied from the facts stated. We do not think that on this ground the contention of the appellant can be thrown out.

13. It is, however, strenuously argued by Mr. Phadke that the cases in *Donoghue v. Stevenson* and *Grant v. Australian Knitting Mills, Ltd.* qualify the liability of the manufacturer on the ground of negligence. It is contended that negligence must cause injury either to the person of the user or his property and not merely monetary loss, relying on the observations in the last but one paragraph of Lord Atkin's judgment where he says (p. 599):

?with the knowledge that the absence of reasonable care in the preparation or putting up the products will result in an injury to the consumer's life or property?.

He refers us to Winfield on Tort, 6th ed., page 665, where it is said:

The principle is limited to physical damage to the person or property of the consumer or user, and does not extend to pecuniary loss suffered by relying on negligent misrepresentation.

He also refers us to Clerk & Lindsell on Torts, 12th ed., at page 697 where it is said:

It would be true to say that there is a wide recognition of physical injury to person and property, but that the law is very hesitant about recognising pecuniary loss.

The authorities cited by the learned authors do support the proposition made by the authors. But *Wilkinson v. Coverdale* (1793) 1 Esp. 74 and *Morrison Steamship Co. Ltd. v. Greystoke Castle Cargo Owners* [1947] A.C. 265 show that monetary loss caused by negligence of a person may be recovered by a third party. We may in this connection refer to the dissenting judgment of Denning, L.J., in *Candler v. Crane, Christmas and Co* [1951] 2 K.B. 164. where the learned Judge very emphatically expressed his opinion holding the defendant liable. Mr. Phadke made the same argument as was made in that case that so far there is no authority to support the liability of his client. The learned Judge says (p. 178):

?If you read the great cases of *Ashby v. White* (1703) 2 Ld. Ray 938, *Paisley v. Freeman* (1789) 3 Ter. Rep. 51, and *Donoghue v. Stevenson* you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed. Whenever this argument of novelty is put forward I call to mind the emphatic answer given by Pratt, C.J., nearly two hundred years ago in *Chapman v. Pickersgill* (1762) 2 Wil 145 when he said: I wish never to hear this objection again. This action is for a tort: torts are infinitely various; not limited or confined, for there is nothing in nature but may be an instrument of mischief. The same answer was given by Lord Macmillan in *Donoghue v. Stevenson*, when he said: (p. 619): The criterion of judgment must adjust and adopt itself to the changing circumstances of life. The categories of negligence are never closed.

14. The law of tort itself is of slow growth according to the changing needs of the society. No general principle of liability in tort is discoverable. The Judges have from time to time contented themselves by saying whether liability existed in a particular case. It would seem that the general principle, as stated by Lord Atkins in *Donoghue v. Stevenson*, is (p. 580):

?The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.

So far as we in this country are concerned, in the absence of statutory or

customary law applicable in a case we must be guided by the principles of justice, equity and good conscience. One very often turns to the principles of English Common law though it cannot be said that we are tied to them. If a particular principle does not depend upon any technicality of English law and is applicable to conditions here then it is usual to apply the principle. However, as pointed out by the Judicial Committee in (1879) L.R. 6 I.A. 145 (Privy Council) :

?It is only applicable because it is agreeable to general equity and good conscience. And, again, if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions, although those decisions are undoubtedly valuable, in so far as they recognise the general equity of the principle, and show how it has been applied by the Courts of this country.

In the absence of any binding authority to the contrary we would prefer to adopt the view expressed, by Denning L.J. in *Candler v. Crane Christmas and Co.* In the case of manufactured commodities most often under monopolies if the law were limited as contended for by Mr. Phadke, there will be no remedy to the buyer who must and does rely on the skill, reasonable care and honesty of the manufacturer. Obviously the manufacturer in many cases may not only be negligent but worse. The consumer in such a case must buy an article irrespective of its usefulness as there is no competitor in the market. It cannot be gainsaid that it is wrong to supply sub-standard goods and there should be no reason why the remedy should not extend to a negligent manufacturer causing monetary loss by the supply of a sub-standard article. We would apply to such cases the words of Knight Bruce L.J. in *Slim v. Croucher* (1860) 1 De G.F. & J. 518:

?A country whose administration of justice did not afford redress in a case of the present description would not be in a state of civilization.

and hold, that defendant No. 1 is liable.

15. It is argued that such a view of the law will hamper trade. Everyone would want trade to prosper but certainly not at the cost of the consumer. It would not be unreasonable to expect the consumer to rely on the honesty and care on the part of the manufacturer and get his money's worth. As the rule has obvious limitations as pointed out by Lord Wright in *Grant v. Australian Knitting Mills* at p. 107, we think that the fear is groundless.

16. We also do not think that the warranty and the expiry of the period makes any difference, since the defect could not possibly have been discovered before the period expired. In our view, the terms of the warranty do not help the defendants.

17. The rest of the judgment is not material to this report.