

(1929) 03 AHC CK 0005
In the Allahabad High Court

Empire Engineering Co. Branch of the British India
Corporation Ltd.

APPELLANT

Vs

Municipal Board

RESPONDENT

Date of Decision : 16-03-1929

Acts Referred:

Contract Act, 1872 — Section 118

Citation : AIR 1929 All 801

Judgement

1. This is the plaintiff's appeal. His suit was practically dismissed by the Court of first instance. On appeal by him and on a cross-objection put in by the defendant, the learned Judges composing the Bench hearing the appeal agreed in dismissing the cross-objection but differed as to the result of the appeal. The result was that both the appeal and the cross-objection failed. It is against the order of the Court dismissing the appeal that the present appeal has been failed.

2. A limited company, described as "plaintiff," brought the suit of which this appeal has arisen for recovery of Rs. 19,048-1-9, being the price of a motor lorry and a pumping apparatus supplied by it to the defendant, the Municipal Board of Bareilly. The plaintiff was a simple one. It stated that the defendant, the Municipal Board of Bareilly, had purchased from the plaintiff the articles mentioned and agreed to pay the price in certain instalments detailed in the plaintiff. It further stated that delivery of the lorry, the pumping apparatus and other implements was made, all in good working order, on 3rd September 1921, but the defendant did not pay the balance of the price due to him. He accordingly claimed the balance of the price with interest at 12 per cent per annum.

3. The defence, so far as it is now material, was that the lorry supplied was not "in accordance with the contract" and was on test found to have several defects in it and did not prove to be serviceable, that the plaintiff had agreed to supply a new lorry and one which would not consume more than 1? gallons petrol in an hour, but the plaintiff supplied one which did not answer to the descriptions. The defendant also pleaded fraud on the part of the plaintiff but did not furnish any particulars beyond what has already been stated in this summary of his case.

The defence ended by saying that the contract was null and void and the plaintiff had no right to maintain the suit. The defendant also contended that he was entitled to a refund of the sum of Rs. 5,000 which he had admittedly paid towards the price. The defendant, however, did not pay any court-fee and did not claim a refund. The liability of the defendant to pay interest was denied.

4. It will be noticed that on the pleadings as described above, the issues that arose in the case were the following:

1. Did the plaintiff agree to sell to the defendant a lorry of a particular description? If so, what were the particulars of the lorry agreed to be sold?

2. Did the lorry supplied answer to the description of the one agreed to be supplied?

3. If the lorry supplied did not answer to the description agreed upon, can the defendant refuse to pay the price, having regard to the provisions of Section 118, Contract Act.

4. Is the defendant entitled to any and what compensation? How is the question of compensation affected by the fact that no notice u/s 118, Contract Act, was given?

5. Is the plaintiff entitled to any and what interest?

5. (Their Lordships then discussed evidence that the lorry delivered in September 1921, was in all respects a machine in good order and condition, free from all defects, and in all respects answered to the contract, proceeded.)

6. Point No. 3.-Supposing that the lorry delivered to the defendant did not answer, in its entirety, to the article ordered, the defendant had every right to refuse to accept the article. He could use the article sufficiently long to find out whether it answered or not the description of what he wanted. Section 118, Contract Act, lays down the law on the point and the illustrations make the law absolutely clear. That section briefly lays down that when there has been a contract with a warranty for sale of goods which at the time of the contract was not ascertained, and the warranty is broken, the buyer may accept the goods or refuse to accept them, when tendered. It further lays down that it is open to the buyer to keep the goods for a reasonably sufficient time in order to examine or try them in order to decide whether he would refuse or accept them. The user of the goods, however, must be limited to the trial and must not go beyond that. Such being the law, when the lorry was placed in the hands of the defendant, it was the latter's duty to have it thoroughly examined, and if necessary, by an expert. After examination, the defendant could decide either to keep it or to return it. If, however, he kept it for a period longer than it was necessary to keep it for the purpose of ascertaining whether it answered or not to the contract, he lost his right to return it or to refuse to pay the price.

7. On behalf of the respondent, reliance was placed on English law and it was

argued that there is a difference between a "condition" of a contract and a "warranty." It was urged that where the condition of a contract is broken, there can be no contract at all. It is, however, to be pointed out that our Indian law has deliberately, we must take it, avoided the distinction between a condition and a warranty. The illustrations given u/s 118, will make the matter clear. In illustration (c), B makes two pairs of shoes for A by A's order. A tries both, but uses one pair more than a mere trial requires. The shoes do not fit him. He cannot return the pair which he has used more than was necessary for the purpose of a trial. He must keep them and pay for them. The other pair he can return. It was certainly a "condition" to the acceptance of the shoes by A, that the shoes should fit. It may very well be said that it was a condition of the contract that the shoes should fit the person ordering them. Yet the case is put u/s 118 as fully covered by it. We are governed by the Indian law and must decide the case in accordance with its principles.

8. Then it was urged that as the defendant ordered a new lorry and he got a second-hand one and there could be no contract, in law, if the parties were not agreed as to what was to be supplied. On the facts, we have found that such was not the case. The defendant never stipulated for a new lorry, nor did the plaintiff firm ever promise one.

9. Supposing, however, that the defendant expected a new lorry and was given a reconditioned one. Even then Section 118 would apply. He could only "expect" what he had bargained for. There was the lorry before the defendant and he had every opportunity and right to have it thoroughly examined. Further, if there was a breach of the warranty, on the ground that the lorry was not a new one, the defendant could claim compensation, provided he gave notice of his intention to claim compensation within a reasonable time, after discovering the breach of the warranty. That was, under the law, the defendant's only right after he had accepted the goods after an exercise of his right of acceptance or refusal. The defendant now cannot refuse to pay for the goods which he has kept and used.

10. Point No. 4.-In dealing with point No. 3, we have already dealt with the question of compensation. The question of compensation was not definitely raised. The defendant said in para. 16 of the written statement that he was entitled to a refund of the part payment made by him. We have already said that the defendant did not claim the amount as a set off for his counter claim nor did he pay any court-fee on it.

11. On the merits, however, the defendant has no case. It was incumbent on him to give notice of his intention to claim compensation, as soon as he discovered (if ever) the fact that the warranty had been broken by delivery of an article that did not implement the contract. The defendant is not entitled to any compensation, nor to any refund of any part of the price paid by him.

12. Point No. 5.-The question of interest, has not been discussed before us It arose, because there is the claim for interest and the defence was that no

interest was payable. The contract has been broken and the plaintiff is entitled to interest by way of damages u/s 73, Contract Act. The rate of interest is reasonable, being 12 per cent per annum. We allow the plaintiff interest at the rate claimed, by way of damages.

13. The result is that the appeal succeeds, the decree of the Court below and of this Court are modified and the claim is decreed in full with costs throughout. Interest on the amount of the claim will be paid at six per cent per annum from the date of the institution of the suit till realization, and the costs will bear interest at the same rate from this date till realization.