

(1960) 03 P&H CK 0014
In the Punjab And Haryana At Chandigarh
Case No : Firm Appeal No. 72 of 1953

Firm Sohan Lal Arjan Dass	Vs	APPELLANT
Firm Banwari Lal Vishwa Nath		RESPONDENT

Date of Decision : 09-03-1960

Acts Referred:

Sales of Goods Act, 1930 — Section 35, 36, 45, 46, 56

Citation : AIR 1960 P&H 549

Hon'ble Judges : I.D. Dua, J; Bishan Narain, J

Bench : Division Bench

Judgement

Dua, J.

(1) The facts out of which the present appeals (Regular First Appeals Nos. 72 and 104 of 1953) have arisen are briefly stated as follows: Banwari Lal Bishwa Nath, a joint Hindu Family concern, is said to have purchased 50 bales of cotton weighing 239 maunds 7 seers and 3 chhatanks from the agency of the defendant-firm Sohan Lal Arjan Das at Rs. 26-8-0 per maund on Baisakh Sudi 14 Sambat 2000, the pressing charges being Rs. 12/13/6 per bale in addition.

The plaintiffs are also alleged to have entered into other transactions of cotton with the defendant-firm on account of which a sum of Rs. 3,200 has been alleged to be due to the defendant-firm from the plaintiff-firm; interest is said to be payable at the rate of Rs. 0-8-0 per cent per mensem and the arhat, dharmada, brokerage, etc. also being chargeable at the rate of Rs. 0-12-0 per cent. It is further alleged that the plaintiff-firm was entitled to the delivery of the goods purchased by them on payment of the balance at any time, but the defendant-firm did not deliver the aforesaid 50 bales in spite of repeated demands and notice and even telegrams, although the plaintiffs had all along been willing and ready to pay the balance of the amount due.

The last telegram demanding delivery of the above bales is alleged to have been sent to the defendants on 7th of November 1949, but the latter refused to give

delivery on frivolous and untenable pretexts. The rate of cotton in November 1949, according to the plaintiffs was Rs. 52 per maund; the price of the cotton at the said rate along with the pressing charges came to Rs. 12, 929/9/- ; after deducting the sum of Rs. 3,200 and other expenses, the amount due to the plaintiffs has been calculated by them at Rs. 9,568/- for the recovery of which the present suit was instituted on 30th of November 1949.

(2) Sohan Lal defendant has denied the claim and has pleaded that the plaintiff-firm actually purchased 50 bales of cotton weighing 239 maunds 7 seers and 3 chhatanks at the rate of Rs. 16/7/- per maund besides pressing charges on Magh Sudi 4, Sambat 1999 and that these bales were, at the instance of the plaintiffs, transferred to the khata of Bishwa Nath Raghu Nath at the rate of Rs. 26/8/- per maund on Baisakh Sudi 14, Sambat 2000.

It is further averred that firms Banwari Lal Bishwa Nath and Bishwa Nath Raghu Nath are identical and that the plaintiffs also entered into other transactions of cotton bales and kachi cotton through the defendant-firm with the result that the plaintiff-firm owes a sum of Rs. 7,600 to the defendant-firm. It is then pleaded that the bales purchased by the plaintiffs were actually sorted in the godown of firm Nanak Chand-Mam Raj and that one Jagan Nath-Mahabir Parshad of Hansi fraudulently pledged these bales with the Bharat Bank.

This fraudulent pledge of these goods resulted in litigation and the defendants had to establish title to these bales in both criminal and civil Courts, with the result that it was not possible for them to deliver the bales to the plaintiffs when demanded. The defendants have also claimed a right to the reimbursement for the expenses incurred in the said litigation.

(3) On the pleadings of the parties the Court, settled the following issues for trial:

1. Were any items over and above the admitted items advanced by the plaintiff to the defendant in cash or in kind? If so, what are those items and of what date and what is the market-value of the advances in kind?
2. Were any items over and above the admitted items advanced by the defendant to the plaintiff in cash or in kind? If so, what are those items and of what date and what is the market-value of the advance in kind ?
3. Were the 50 bales of cotton purchased on Baisakh Sudi 14, Sambat 2000, at the rate of Rs. 26-8-0 the same bales as were purchased originally on Magh Sudi 4, Sambat 1999, at the rate of Rs. 16-7-0 and sold on Baisakh Sudi 14, Sambat 2000, at the rate of Rs. 26-8-0 and purchased on the same date? If so, what is its effect?
4. Were the bales in dispute wrongfully pledged by firm Jagan Nath-Mahabir Parshad to Bharat Bank which led in a criminal litigation against the said firm and passing of bales in the custody of the Court and necessitated a civil suit by the defendant to establish his title in those bales?

5. If so, is defendant justified in law in not delivering the goods when claimed?
6. If issue No. 4 is proved, what did the defendant spend in safeguarding the title to the bales and is he entitled to its credit?
7. If issue No. 4 is not proved, when did the plaintiff claim the goods and to what damages and at what rate is he entitled on account of the non-delivery?
8. Is the plaintiff barred by his conduct?
9. To what amount as commission, godown-rent, interest and insurance charges and other incidental expenses in the defendant entitled under agreement or according to the mercantile usage ?
10. Relief.

(4) The trial Court passed a decree for Rs. 9,500 with costs in favour of the plaintiffs. Both parties feeling aggrieved have preferred appeals to this Court; the defendants against the decree for Rs. 9,500 and the plaintiffs for future interest till realisation.

(5) In order to understand the correct position, it would be helpful to give the dates about the relevant transactions and the correspondence which passed between the parties. On 8th of February 1943 the plaintiffs admittedly purchased 50 bales at the rate of Rs. 16-7-0 per maund. On 18th of May 1943 the present transaction of purchase by the plaintiffs of 50 bales at Rs. 26-8-0 per maund was entered into. It appears, that for a period of nearly two years and eight months the parties kept quiet and it was only on 12th of January 1946 that we find the defendants sending a notice to the plaintiffs calling upon them to take delivery of the goods and pay the price; the rate quoted by them was Rs. 20 per maund.

For another period of about three years and nine months there was again silence on both sides till 4th of October, 1949 when the plaintiffs gave notice through their counsel to the defendants claiming delivery of goods. It was however, stated in it that after deducting their amount a sum of Rs. 3,200 was due to the defendants on account of the transaction in question, and delivery of bales is demanded by the plaintiffs on payment of the above amount (Exhibit D.W. 15/2).

On 7th of November, 1949 a telegram was sent on behalf of the plaintiffs claiming delivery and in the alternative directing sale of the bales in question at market-rate (Exhibit D.W. 15/4). On 9th of November 1949 reply to the above notices was sent on behalf of the defendants by their counsel in which full details are given and it is stated that the bales in question were in possession of the Court and that the defendants were incurring expenses in prosecuting the criminal litigation and a civil suit had also been filed by them; all the steps are alleged to have been taken with the plaintiff's knowledge.

A sum of Rs. 7,600 is said to be due from the plaintiffs. Liability on the part of the defendants is thus denied (Exhibit D.W. 15/7). On 11th of November 1949 reply to the above letter was sent by the plaintiffs, controverting the defendants'

version and reiterating their own and intimating that unless the goods were delivered a suit would be filed.

(6) It is in these circumstances that on 30th of November, 1949 the present suit was instituted. In the plaint no reference was made to the earlier transactions, the only transaction mentioned being that of 18th of May 1943 on which the claim was based. The total price of the bales claimed by the plaintiff was Rs. 12,428 at the rate of Rs. 52 per maund, which is alleged to be the rate prevailing on the day when the telegram was sent, i.e., 7th of November 1949. It is expressly stated in the plaint that the plaintiff was entitled to take delivery of the goods from the defendants at any time on payment of the amount due and the defendant-firm was liable to make the delivery.

(7) The suit was resisted on various pleas, including preliminary objections relating inter alia to locus standi and limitation. The bales, according to the written statement, had been taken possession of by the police and responsibility for non-delivery was on this ground disowned by the defendants who averred that they were only commission-agents. It seems that at the time of the filing of the suit the criminal case was still pending.

(8) Before dealing with the respective contentions advanced before us, I may state that the appellants conceded that the earlier date of 8th of February, 1943 is not relevant for the purposes of the present appeal as para 6 of the written statement is not being pressed before us, with the result that issue No. 3 does not concern us at this stage. The counsel for the appellants first took up issue No. 7 which relates to the time when the plaintiffs claimed the goods and to the quantum of damages on account of non-delivery.

Mr. Aggarwal has submitted that there being no time fixed for the performance of the contract, as a matter of law it had to be performed within a reasonable time, and if the buyer does not claim delivery of the goods within a reasonable item then the seller is not bound to keep waiting for the buyer's convenience indefinitely. He has in this connection laid great stress on the point that on 12th of January 1946 the defendants sent a notice to the plaintiffs to take delivery and pay the price, but the plaintiffs did not care to move their little finger for three years and nine months. The counsel has also placed reliance on section 56 of the Indian Sale of Goods Act which is in the following terms:

"56. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance."

According to the counsel, the plaintiffs having wrongfully neglected or refused to take the delivery of the goods in pursuance of the notice dated 12th of January 1946, it is the defendants who are entitled to claim damages and not the plaintiffs who have instituted the present suit. While developing his argument, the counsel also referred to sections 45 and 46 of the Indian Sale of Goods Act which deal with the subject of "Rights of Unpaid Seller Against the Goods". In my opinion, however, these sections are of no relevancy in the present case.

Section 35 of the said Act, however, does provide that apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery. The counsel has tried to utilize this provision in his own favour by stressing that although the contract was entered into in May 1943 the plaintiffs did not claim delivery of goods till as late as 4th of October 1949. Section 36 of the Indian Sale of Goods Act was also referred to by Mr. Aggarwal, but in my opinion it cannot appreciably advance the appellants' case.

It is true that in sub-section (2) it is laid down that where under the contract of sale the seller is bound to send the goods to the buyer but no time for sending them is fixed, he is bound to do so within a reasonable time. In the present case, however, it is neither party's case that the sellers were bound to send the goods to the buyers. Counsel tried to seek some support for his contention from *The Bank of Morvi, Limited Vs. Baerlein Bros.*, the first head-note of which lays down-

"Where the parties have agreed to extend the time and no particular period for extension is mentioned the vendors are bound to deliver their goods only within a reasonable period beyond the contract time and the vendees are not justified in refusing to take delivery of the goods. The property in the goods does not pass to the vendees and therefore the vendors are not entitled to sue for the price and the plaintiffs are entitled to damages represented by the market-rates at the dates of breach."

Reference has also been made on behalf of the appellants to *Dinkerrai Lalit Kumar Vs. Sukhdayal Rambilas*, and particular reliance is placed on a head-note (d) which is in the following terms:

"The law implies a reasonable time within which the contract is to be performed when the contract itself is silent as to the time of performance. Once a reasonable time is implied within the meaning of section 36, sub-clause (2), the contract becomes a contract to be performed at a fixed time as much as if the parties themselves have fixed a specific time. In the one case it is the Act of parties which determines the time when the contract is to be performed; in other case it is by implication of law that the time is determined.

But in either case time cannot be extended by the unilateral Act of a party. In the first case, when the fixed time has expired there would be a breach; in the latter case, when the reasonable time implied by the law has expired, equally so there would be a breach unless either in the one or in the other case there is an agreement between the parties to extend the time for the performance of the contract."

(9) Reference was also made to AIR 1932 196 (Privy Council) for the proposition that the date of breach of a contract is the date when the contract ought to have been but was not performed and the date of refusal of liability or repudiation. I do not think this proposition can help us in deciding the precise point with which we are at the moment dealing. *Mohammad Abdul Subhan v. Firm Ghulam Hussain Ahmad Ali and Co.* AIR 1935 Nag 66, is equally unavailing for our present

purpose.

Mr. Aggarwal has laid great emphasis on the contention that plaintiffs must allege and prove demand for delivery within a reasonable time and having not done so we should hold, as a matter of law, that the plaintiffs are guilty of breach. I am unable to uphold this contention. To begin with, we find that although the transaction took place in May 1943, even up till January, 1946 the defendants considered the contract to be subsisting and alive. This obviously shows that even according to the defendants three years" period was not considered to be reasonable.

Besides even when notices were sent by the plaintiffs, the defendants did not take up the plea that the plaintiffs had not demanded delivery for an unreasonably long period. It is conceded at the Bar that reasonable time must in each case depend upon the particular circumstances, the nature of the commodity, the terms through which the contract was entered into, and so on. But this apart, the present contention does not even find place in the fifteen grounds contained in the memorandum of appeal filed on behalf of the defendants in the Court.

The counsel has in a half-hearted manner urged that ground No. 14 may be construed to cover the point. This ground merely states the correct approach has not been made to the case by the trial Court. It obviously cannot be construed to cover the present contention. On the existing record and the pleadings of the parties including the grounds of appeal filed in this Court, I cannot uphold the appellants" contention.

(10) Normally speaking a contract remains for force and terminates strictly in accordance with its terms, express or implied. Provisions as to its duration are to be so construed as to effectuate the mutual intention of the contracting parties as evidenced by the language of the agreement in the light and background of recognised customs, if any as to the particular nature of the contract. In the absence of any express or implied terms, the conduct of the parties is a fairly safe guide, and in the present case the conduct of the parties does not support the appellants" contention.

Generally, all the parties to a contract must assent to its recession or abrogation and there must be a meeting of their minds in order to accomplish a rescission or abrogation by agreement; one of the parties cannot by himself rescind the contract by merely giving a notice of intention so to do and a contract can only be treated as abandoned when the acts of one party inconsistent with its existence are acquiesced in by the other. But at mutual abandonment, cancellation or rescission must be clearly expressed and Act and conduct of the parties to this end must be positive, unequivocal and inconsistent with the existence of the contract. That is not the position in the present case.

(11) Mr. Aggarwal next dealt with the question of rate of damages. He contended that the trial Court found 11th of November 1949 to be the due date. According

to Mr. Aggarwal, however, 4th of October 1949 should have been held to be the due date, because the plaintiffs demanded delivery on that day. He, however, contended that there is no reliable evidence with respect to the rate of cotton on either of these two dates.

The Court below placed reliance on the testimony of Megh Raj P.W. 5. This witness, as has been elicited in his cross-examination, is very nearly related to the plaintiffs; Banwari Lal, father of Bishwa Nath, being his wife's real brother. Besides, he has deposed in support of the rate on 11th of November 1949 being Rs. 52/8/- per maund on a transaction as shown in Exhibit P.W. 5/1, but for reasons best known to the plaintiffs, the other party to this transaction has not been produced.

In his cross-examination he has deposed that the year of the cotton purchased by him did not appear in the basis but it was two years earlier, and this he deposed by merely depending on his memory. When questioned whether there are any controlled rate of cotton, and even when a positive suggestion was put to him that the rate was Rs. 48 per maund, he expressed his inability to say anything. He merely stated that if there had been any control, he would not have made the entry in his bahi.

In view of the interested character of the witness and in the absence or non-production of the other party to the transaction, it is not possible for me to attach much weight to his testimony. The only other evidence to which our attention was drawn by Mr. Bhagirath Das on the question of rates is that of D.W. 3 Shri Sharanagat Singh, Magistrate Ist Class. But he has merely deposed to the auction of 150 bales on 4th of April 1950 at Hansi.

This auction refers to the bales which were in the custody of the Court in State v. Jagan Nath, I do not think this witnesses' testimony is of any help. Mr. Bhagirath Das, has, of course, drawn our attention to certain entries in Exhibit D.W. 13/3 and in Exhibit D.W. 13/2 in support of his submission that the transactions of sale and purchase of cotton bales were at times settled even after five years.

But as we are of the view that the transaction in question could not be considered to have been abandoned or give up the plaintiffs as contended on behalf of the defendant-appellants, it is not necessary to express any opinion on the relevancy or value of these entries. There being no reliable evidence on the question of the rate of cotton bales on the dates of breach, in my view the decision of the trial Court on issue No. 7 cannot be sustained.

(12) Mr. Bhagirath Dass has, however, contended that this finding does not necessarily entail the dismissal of the entire suit. He has submitted that his clients are, in any case entitled to the payment of the price paid by them at the rate of Rs. 26-8-0 per maund. This amount, according to the counsel, comes to Rs. 7,006-10-0. The respondents have, in support of this contention, also referred us to Exhibit P. 1 at page 72 of the printed paper-book and Exhibit D.W. 13/3 at page 125 of the printed paper-book. It is agreed that out of this amount

the sum admitted by the plaintiffs to be due to the defendants has to be deducted.

(13) This brings us to issue No. 2. This issue consists of six items, which have all been disallowed by the trial Court.

(14) The first item consists of Rs. 200. On behalf of the defendants nothing convincing or cogent has been said in criticism of the judgment of the lower Court. The defendants have not successfully proved this item. The next item consists of Rs. 239-12-0. The appellants have relied on the evidence of D.W. 15 and on the entry in D.W. 13/3 in which there is a reference to Rs. 239-4-0 having been taken in cash and, therefore, debited to Bishwa Nath-Raghu Nath. This entry, as explained by Mr. Bhagirath Das, is the last item and the bottom entries clearly do not appear to have been entered in the regular course of business.

The explanation given by Jai Narain D.W. 14, a munib of the defendant-firm, is most unsatisfactory. This item must also be held to have been rightly disallowed by the lower Court. The third item relates to a sum of Rs. 641-0-6. In connection with this item also it is significant that no parchis have been produced though, as admitted by Jagdish Raj D.W. 11, according to the usage of the Hansi market, a parchi must be issued to the purchaser of cotton-seed, even if the transaction related to purchase of cotton-seed worth Re. 1 or more. Mr. D. N. Aggarwal has failed to successfully assail the conclusion of the trial Court on this item.

(15) We next come to the item of Rs. 1,322-7-9. This also relates to the alleged purchase of 75 maunds of binolas from the factory of Mahabir Parshad. We find in the testimony of Jagdish Sahai P.W. 4 that no octroi was paid by the plaintiffs on 14th of February, 1949 which they would, normally speaking, have paid if they had purchased the binolas and taken them into the limits of the municipal committee. The trial Court has given very good reasons for disallowing this item and the appellants have not been able to dislodge this finding. Reference to Exhibit D.W. 5/3 and to the testimony of D.W. 5 Mahabir Parshad, and D.W. 7 Sheoga is hardly conclusive or even trustworthy.

(16) We next come to the item of Rs. 1,000 in support of which the counsel has only referred us to the evidence of Jai Narain D.W. 14. In this connection it is noteworthy that the books of account of Sohan Lal-Chandgi Ram was not been produced. The evidence of Lachhman D.W. 6 and of Jai Narain D.W. 14 on this point is also not easy to reconcile. I have thus no hesitation in disallowing this item as well.

(17) Coming to the last item of Rs. 282, Mr. Bhagirath Das has conceded that Rs. 150 on account of insurance has to be allowed. The balance of the amount relates to shortfall in weight to the extent of four maunds and this, according to the counsel, has not been proved by the defendants. Issue No. 2, therefore, except for a sum of Rs. 150, should be held to have been rightly decided by the Court below against the defendants. It is agreed at the Bar that if issue No. 2 is decided against the defendants-appellants, then in all a sum of Rs. 3,200 should

be held due to the plaintiffs from the defendants.

(18) In the light of the above discussion, therefore, this appeal is allowed in part and the decretal amount is reduced to Rs. 3,200.

(19) In so far as the cross-appeal filed by the plaintiffs (Regular First Appeal No. 104 of 1953) is concerned, no case has been made out for granting future interest.

(20) In the result Regular First Appeal No. 72 of 1953 is allowed in part and the plaintiffs are granted a decree for a sum of Rs. 3,200 only and Regular First Appeal No. 104 of 1953 is dismissed. In the circumstances of the case both the parties will bear their own costs throughout.

Bishan Narain, J.

(21) I agree.

(22) Order accordingly.