
(1960) 01 OHC CK 0009
In the Orissa High Court
Case No : First Appeal No. 44 of 1952

Firm Surajmall Radhakrishna and Others	APPELLANT
Vs	
Firm Sevbux Rai Haradutta Rai	RESPONDENT

Date of Decision : 14-01-1960

Acts Referred:

Sales of Goods Act, 1930 — Section 2(13), 4, 55(2)

Citation : AIR 1960 Ori 165

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

Bench : Division Bench

Advocate : M.S. Rao and K.N. Das, for the Appellant; H. Sen, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, C.J.—This is an appeal by the defendant against the judgment of the learned Subordinate Judge, Puri decreeing with costs the plaintiff's suit for recovery of the sale price of a Diesel engine No. J. P. 3472 (14 H.P.) for a flour mill, said to have been delivered to the appellant-defendant by the plaintiff in pursuance of an agreement Ext. 1, dated 24-6-1949.

2. As the decision of the appeal mainly depends on a proper construction of the said agreement, it may be reproduced in full :

"Ext. 1 Agreement by Surajmall Radhakrishan to the plaintiff, dated 24-6-1949.

Surajmall Radha Krishna, Cloth Merchant, P.O. Jatni (Puri) Rly. Station Khurda Road.

Ref. No. Dated 24-6-49.

We Surajmall Radhakrishan of Jatni, P. O. Jatni District Puri, have purchased to day the diesel engine J. P. 3472 of 14 H. P. Blackstone (English made) with flour mill and Dal mill instruments from Messrs. Shivbux Rai Haradutt Rai, Ltd. Jatni, district Puri, on the following conditions :

1. We have purchased the engine and other materials at Rs. 9111/- (Rupees nine thousand one hundred and eleven only).
2. We paid Rs. 1000/- (one thousand) as advance and the rest Rs. 8111/- will be paid by us on two instalments at Rs. 4000/- per year, i.e., in the first year for which we gave one bond up to 23-6-50 for Rs. 4000/- and the other bond for Rs. 4111/- up to date 23-6-51 together with interest of Rs. 0-12-0 (annas twelve only) per Rs. 1000/-.
3. We shall not transfer or sell this engine or its parts to anyone unless we complete the full payment of Rs. 9111 in the stipulated time.
4. If we fail to pay any instalment, the previous payment will be forfeited and the owner of the engine will be entitled to occupy the engine and other materials with the compensation for the losses of materials.
5. We shall have no objection after the purchase of the engine.
6. We declare that the above conditions of this agreement are true to the best of our knowledge, belief and information.

Sd/ Illegible (in Hindi) Surajmall Radha Kishan, Jatni. Dated 24-6-1949"

3. It will be noticed that the agreement says that the engine was sold for Rs. 9111/- and that out of the sale price Rs. 1000/- were paid as advance and that the purchaser agreed to pay the balance of the sale price in two instalments of Rs. 4000/- and Rs. 4111/- together with interest. In paragraph 3 of the agreement the purchaser agreed not to transfer or sell the engine to any one until he paid the full price within the stipulated time. Paragraph 4 contains the usual penalty clause, that if any instalment be not paid the previous payment will be forfeited and the seller who is described as the "owner of the engine "will be entitled to take possession of the same together with compensation. It is further admitted that, by way of security for payment of the aforesaid sum two handnotes (Exts. 3 and 2 (a)) were taken from the defendant on the same date viz. 24-6-1949.

4. The plaintiff's cause of action was said to have arisen when the first instalment was not paid on 23-6-1950 as stipulated in the agreement --Ext. 1. The plaintiff thereupon served a registered notice on the defendant (Ext. 3) calling upon the latter to return the engine in good running condition. The defendant, in reply, Ext. 3(b) dated 14-12-1950 agreed to return the engine to the plaintiff but the plaintiff refused to accept the offer because the engine was not in the same good condition in which it was when it was delivered to the defendant. He, therefore, claimed the sale price plus interest.

5. The plaintiff's case was that on a true construction, the agreement (Ext. 1) was an agreement for sale and as the engine was delivered to the defendant in pursuance of the same, the seller was entitled to the price stipulated for. On the other hand, Mr. M.S. Rao for the defendant contended that the agreement was

essentially an agreement for hire and the plaintiff was entitled only to take back the engine. All other points in controversy in the lower Court were not pressed before us.

6. The essential distinction between the agreement to sell on the one hand and an agreement to hire, on the other, was brought out in two leading English decisions namely (1) *Lee v. Butler* (1893) 2 Q.B. 318, (2) *Helby v. Mathews* 1895 AC 471, and they have been followed in innumerable subsequent decisions both in England and in India. The substance of the transaction as evidenced by the agreement should be found out and too much importance should not be attached to the mere words used as "hire", "hirer", "sale" "sale price" etc. In 1895 AC 471 it was pointed out that so long as the hirer or purchaser -- as the case may be -- reserves to himself the option either to purchase the goods or to return the same the agreement would in substance be an agreement to hire. If however there was no such option left to him and the agreement merely provided for payment of the sale price in instalments, the agreement would really be an agreement to sell. The same principle was brought out in *Halsbury's Laws of England*, Third Edition Vol. 19 at page 544 as follows :

"In every true hire-purchase agreement as opposed to an agreement to buy, the hirer has the right of returning the hired chattel at sometime during the currency of the hiring, or in any event, at the determination of it. Thus he is not compelled to buy but has an option to do so. In a hire purchase agreement which provides that the hirer shall pay a periodic rent so long as the hiring continues and that, in the event of hiring continuing, until a certain sum has been paid by way of rent, the chattel shall become the property of the hirer, the hirer has the right to determine bailment and return the chattel at any time during the hiring."

At page 510 (*ibid*) it was further pointed out that the expression "hire-purchase" is often used somewhat inaccurately to include contracts of hire conferring option to purchase on the one hand and contracts which are in reality agreements to purchase chattels by instalments -- subject to a condition that the property in them is not to pass until all the instalments have been paid.

7. In the light of the aforesaid principle it will be found that the agreement Ext. 1 is in reality an agreement for sale. There is no express provision reserving to the purchaser or hirer the option of refusing to purchase the goods and returning the same. So far as he is concerned Clause 2 of the agreement is final and binding, the only concession in his favour being that the sale price may be made in two instalments. Doubtless Clauses 3 and 4 of the agreement are restrictions on his right of ownership of the property unless full payment of the price is made, but this will not suffice to show that the agreement for sale was not complete.

In Section 4(3) of the Sale of Goods Act the distinction between an agreement to sell on the one hand, and completed sale, on the other, was pointed out and it was observed that where the transfer of property in the goods is to take place at a future time or subject to certain conditions to be fulfilled thereafter, the

contract is a mere agreement to sell. This is all that has been recited in the agreement Ext. 1. Until the entire price of the engine is paid the ownership remains with the seller and the buyer's right to alienate the same is restricted. If the conditions in the agreement in 1893 2 QB 318 be examined, it will be seen that they were also of a similar type. Thus, the third and fifth clauses of that agreement were very similar to the third and fifth clauses of Ext. 1; yet, it was held that the agreement was an agreement for sale, mainly because there was no stipulation reserving an option to the buyer to buy or not to buy.

8. Mr. M.S. Rao then laid stress on the contents of the notice (Ex. 3) issued by the plaintiff's lawyer on the defendant in which he described the agreement as "a hire purchase agreement". He urged that when the plaintiff himself understood the agreement to be a hire purchase agreement that must be taken to be the true intention of the parties. This notice was issued on 12-12-1950 by the plaintiff's lawyer whereas the agreement Ext. 1 is dated 24-6-1949. On the question of the construction of the agreement the opinion given by the plaintiff's lawyer will not be a guide especially for ascertaining the intention of the parties. It may be that the plaintiff's lawyer construed Ext. 1 wrongly, or else it may be -- as pointed out in Halsbury, Third Edition, Vol. 19, page 510 -- that the expression "hire purchase agreement" is very often inaccurately used to include not only a true hire purchase agreement but also agreements to purchase on instalmental payments. Whatever that may be the construction of the agreement must be based on the terms found in the agreement itself, in the light of the well known principles of law and should not be made to depend on the interpretation given to it by the plaintiff's lawyer, long after the agreement was entered into.

9. All the Indian decisions have followed the aforesaid two English decisions and reiterated the distinction between the two classes of agreements. They are A. Cecil Cole Vs. Nanalal Moraji Dave, ; Bhimji N. Dalal Vs. The Bombay Trust Corporation Ltd., ; Mahabali Prasad Vs. H.N. Palmer ; Shyam Kumar Verma Vs. S.P. Misra, ; Mohd. Ismail v. Provl. Automobile Co. AIR 1937 Nag 198 Subbarayalu v. Annamalai, AIR 1944 Mad 526 and The Central Finance and Housing Co. Ltd. Vs. British Transport Co. and Others, which are all cases dealing with agreements for sale and Auto Supply Co., Ltd. v. Raghunatha Chetty AIR 1929 Mad 884 , AIR 1934 133 (Oudh); Suraj and Sons Vs. J.O. Brin and Another and Kasal Narayan v. An Manala Laxmi Narasimham, (S) AIR 1955 Hyd 104 (FB) which are cases dealing with agreements for hire.

In The Central Finance and Housing Co. Ltd. Vs. British Transport Co. and Others, a note of caution was sounded and it was pointed out that though, ordinarily, where the transferee is given the right to terminate the agreement and return the goods it would be a mere hire-purchase agreement, yet it may not be conclusive test because such a condition in the agreement might be inserted mala fide, just for the purpose of giving the document the appearance of a hire-purchase agreement, though, it may not be so in reality. In that particular case it was held that the term was not inserted bona fide. This question however does

not arise for consideration in the instant case because there is no such condition in the agreement -- Ext. 1.

I would therefore in agreement with the lower court hold that there was an agreement for sale of the engine between the plaintiff and the defendant and that in pursuance of that agreement the engine was delivered. The plaintiff's position will therefore be that of a seller who, having parted with the goods has lost his right of lien over the same. It should be noticed in this connection that the definition of the expression "seller" in Section 2(13) of the Sale of Goods Act includes not only the person who sells but also the person who agreed to sell. Hence even if the agreement for sale has not ripened into a completed sale, the previous owner would still be the seller within the meaning of the Act. His only right is to recover the price of the goods under Sub-section (2) of Section 55 of the Sale of Goods Act.

10. The plaintiff-respondent has also filed a cross-appeal against the order of the lower Court refusing him costs and future interest. So far as costs are concerned, the matter being discretionary I am not inclined to interfere. The lower Court pointed out that the defendant was always willing to return the goods in pursuance of Clause 4 of the agreement and the plaintiff might have availed of the same at the earliest opportunity and thus avoided the litigation. The plaintiff should however get the costs of this appeal.

The lower Court has granted him interest as stipulated in the agreement, up to the date of the suit but he has not allowed him interest up to the date of realisation. There seems no reason why the plaintiff should be deprived of his right to future interest also. The amount involved is large and the plaintiff has been kept out of this sum for a very long time.

11. The appeal is therefore dismissed with costs of this Court. The lower Court's order refusing costs of that Court to the plaintiff will remain. Its order allowing interest at 9 p.c. per annum on the unpaid amount, as stipulated in the agreement, is also maintained. But the cross-appeal of the plaintiff is allowed to the limited extent of directing the defendant to pay interest to the plaintiff at 6 p.c. per annum on the total sum decreed from the date of institution of the suit till the date of realisation.

Misra, J.

12. I agree.