
(1959) 12 CAL CK 0021
In the Calcutta High Court
Case No : A.F.O.D. No. 58 of 1957

Hanutmal Bhutoria

APPELLANT

Vs

Dominion of India and Another

RESPONDENT

Date of Decision : 22-12-1959

Acts Referred:

Contract Act, 1872 — Section 148

Sales of Goods Act, 1930 — Section 62, 64

Citation : AIR 1961 Cal 54 : (1961) 1 CALLT 293

Hon'ble Judges : P.B. Mukharji, J;H.K. Bose, J

Bench : Division Bench

Advocate : Somnath Chatterjea, for the Appellant; Subrata Roy Choudhary, for the Respondent

Final Decision : Dismissed

Judgement

Bose, J.—This is an appeal from the judgment of Mallick J, dismissing the appellant's suit for recovery of a sum of Rs. 7155/- on account of short delivery in respect of certain goods which were sold at an auction sale on the 3rd February 1947. The appellant's case is that on the 3rd February 1947 at an auction sale held by Mackenzie Lyall and Co. on the instructions of the Chief Commercial Manager, Bengal and Assam Railway, the appellant in his business of Neemchand Himatmull was declared the highest bidder and purchaser of certain quantities of jute and hemp, the particulars whereof are set out in the plaint. It appears that the appellant was declared a purchaser in respect of six lots, five of which were sold together and Lot No. 7 was sold separately. Lot No. 1 of the first five lots was alleged to consist of 272 bales of jute in bundles and 50 bales jute; Lot No. 2--60 half bales jute in bundles and 30 half bales jute; Lot No. 3 had 70 drums jute; Lot No. 4, had 9 drums hemp; Lot No. 5 had 5 half bales of hemp. The other lot being Lot No. 7 consisted of 182 bales of jute. The appellant paid a sum of Rs. 16000/- in respect of Lots 1 to 5 and a sum of Rs. 11000/- in respect of Lot No. 7. So the total price of the lots which were knocked down to the appellant amounts to Rs. 27000/-. The appellant's case further is that at the

time of taking delivery of the said goods 34 bales were found short in respect of Lot No. 1, 25 half bales were found short in respect of Lot No. 2 and 23 bales were short in respect of Lot No. 7. Shortage in maunds in respect of these bales and half bales has been calculated at 238⁷ maunds and the appellant claims the value of the goods at Rs. 30/- per maund. The claim is thus laid at Rs. 7155/-.

2. The defendants in the suit which was brought by the appellant were two in number being the Dominion of India and Mackenzie Lyall and Co., the auctioneers. In the written statement filed on behalf of the Dominion of India, reference is craved to the conditions of sale pursuant to which the auction has taken place and reliance is placed particularly on Clause 4 of the conditions which was as follows :

"Should any mistake be made in describing a lot specially in stating quality, quantity or measurement, such mistake will not be held to vitiate or affect the sale of such lot in any way, it being understood that intending purchasers should satisfy themselves on all points before bidding. The lots will be at the risk and expense of the purchasers from the moment the sale is declared and would be removed by them with all faults and errors of description."

It is stated in this written statement that by reason of this clause, the defendant is exonerated from any liability in respect of any shortage of delivery as alleged by the appellant. The written statement filed on behalf of defendant No. 2, Mackenzie Lyall and Co., is more or less on similar lines.

3. The parties adduced both oral and documentary evidence before the learned trial Judge in respect of the several issues that were raised before him and the learned trial Judge, as pointed out already dismissed the plaintiff's suit.

4. In this appeal, the point raised by the appellant turns mainly on the construction of a few clauses in the conditions of sale appearing on the handbills which were distributed in connection with the auction sale held on the 3rd February 1947. It would be, therefore, convenient at this stage to set out the conditions appearing in the handbill which are as follows:

- "1. Cash in full on the fall of the hammer and delivery to be taken within 15 days.
2. The Auctioneers may without giving any reason therefore refuse to accept the bidding of any person.
3. If any dispute shall arise between two or more bidders the lot shall be put up again at the last undisputed bidding.
4. Should any mistake be made in describing a lot specially in stating quality, quantity or measurement such mistake will not be held to vitiate or affect the sale of such lot in any way, it being understood that intending purchasers should satisfy themselves on all points before bidding. The lots will be at the risk and expense of the purchasers from the moment the sale is declared and to be removed by them with all faults and errors of description.

5. Any lot not removed within the abovementioned time will lie at the entire risk of the purchaser, and wharfage at the rate of one anna per maund per day or parts thereof will be levied until the goods are removed.

6. If a lot is not removed within 21 days the goods will be re-sold, at the risk of the first purchaser at any convenient time thereafter and the first purchaser will not be entitled to any increase in the price that may be obtained but shall be paid the amount realised on such second sale, not exceeding the figure at which it was brought by him and after deduction of commission and charges.

7. The Railway reserves the right to withdraw any lot at any stage of the auction."

It may also be pointed out that there was another condition put in this hand-bill which appeared in manuscript and was to the effect: "No guarantee for weight and no sorting". The learned Judge has, however, held that this last mentioned clause had been inserted subsequently in the handbill which was exhibited bettor him and that it did not form part of the conditions of sale.

5. The first contention of Mr. Chatterji, the learned Counsel for the appellant, is that the learned trial Judge is wrong in applying Clause 4 of the conditions of sale to the facts of this case. It is argued that the case of the respondents at the trial was that there was no mistake or misdescription in the handbill with regard to the particulars of goods set out therein and consequently there is no scope for the application of Clause 4 to the facts of this case. It appears, however, from the deposition of Kali Krishna Roy who was the Goods Supervisor, Chitpore, at the relevant time that his evidence on this point is full of contradictions. At one stage, he has suggested that there was possibility of mistake in the description of the lots of goods (Qs. 153 to 201) but in answer to questions 206 and 207, he maintains that there was no mistake. Apparently, the learned Judge has not placed reliance on the testimony of this witness that there was no mistake. It is true that the godown register of the Railway at Chitpore has been produced to show that the goods described in the handbills were all there at the godown and the case of the defendants had been that the entire quantity had been delivered to the plaintiff but it is also clear from the correspondence that has been tendered in this case that the defence of the Government all along had been that Clause 4 of the conditions of sale was an answer to the plaintiff's claim. In the letter written on behalf of the Chief Commercial Manager to Mackenzie Lyall and Co. on the 25/26th June 1947, it is specifically pointed out that the appellant's Solicitors should be informed that the claim put forward by the appellant is not entertainable in view of paragraph 4 of the conditions contained in the handbill which was distributed before the auction was held. It also appears that a copy of this letter was forwarded to the appellant's Solicitor on the 28th June 1947.

6. Mr, Chatterji argued that the written statements filed on behalf of the respondents show that the defendants were not relying on the first part of Clause 4 of the conditions of sale but only on the second part thereof. We have already referred to the written statements which have been filed on behalf of the

respondents and we see no reason to limit the scope of defence only to the second part of Clause 4. The written statements refer to Clause 4 of the conditions and rely on the whole of it.

7. Now, coming to the question of construction of Clause 4 of the conditions of sale, it may be pointed out that the whole object of inserting this Clause was to put the prospective bidders on their guard against any error in the description of the lots of goods put up for sale. The bidders were advised to examine or inspect the goods before bidding and satisfy themselves that all the goods were there. In other words, sufficient warning was given to the bidders to check the lots before buying the goods and it was made clear that for any mistake or mis-description as regards quantity or quality or measurement of the goods, the sellers would not be liable. Clause 4 was intended to afford protection to the sellers if it turns out that there has been mistake in describing the goods specially as to their quantity, quality or measurement. The learned trial Judge has come to the conclusion that the facts of the present case bring it within Clause 4 although a different case had been sought to be made on behalf of the defendants in course of the evidence given before him. We think that the learned Judge's conclusion is correct.

8. A point has cropped up in course of discussion during the hearing of this appeal whether Clause 4 of the conditions of sale is an equitable or reasonable Clause and whether it is binding on the appellant. Section 62 of the Sale of Goods Act provides as follows :

"Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties or by usage, if the usage is such as to bind both parties to the contract".

So it is open to the parties to enter into special stipulations varying the ordinary rights and obligations attached to a transaction of sale so long as such stipulations are not illegal. Thus, though u/s 64 of the Sale of Goods Act which deals with auction sales, certain implications may arise upon an auction sale being held, it is possible for the parties by special agreement to vary some of the rights and obligations arising from such sale. The wording of Clause 4 makes it clear that although certain descriptions had been given in the handbills about the quantity and quality of the goods to be sold, no actual warranty was being given by the sellers as to the accuracy of such description and the buyer is put on his guard to verify the correctness of the description before bidding. So, if there was really any misdescription in this case, which admittedly there was, such misdescription was at the highest an innocent misdescription on the part of the sellers as to the quality of the goods. It was not a case of fraudulent misdescription. It is well-known that for innocent misrepresentation or misdescription, no claim for damages will lie. I (Hcilbut, Symons and Co. v. Buckleton, (1913) AC 30 48 to 49 per Lord Moulton). The appellant could have rescinded the whole transaction after restoring the goods purchased by him but

that course was not adopted and no restitution in integrum is now possible. The evidence also makes it clear that the goods taken delivery of are actually worth much more than the price paid. So the plaintiff has not really suffered any loss as a result of the trans-action.

9. The question of reasonableness of a somewhat similar Clause came up for consideration before the Court of Appeal in England in the case of *Couchman v. Hill*, (1.947) 1 All E.R. 103. In that case, the plaintiff bought at an auction sale a heifer belonging to the defendant and described in the sale catalogue as a "red and white stick heifer unserved." The catalogue contained the following words:

"All lots must be taken subject to all faults or errors of description (if any) and no compensation will be paid for the same". By Clause 3 of the conditions of sale:

"The lots are sold with all faults, imperfections, and errors of description, the auctioneers not being responsible for correct description, genuineness or authenticity of or any fault or defect in, any lot and giving no warranty whatsoever".

Before the sale was actually held and when the heifers were in the ring, the plaintiff asked the defendant and the auctioneer whether they were prepared to confirm that the heifers were unserved to which an answer in the negative was given. Between seven and eight weeks after the purchase, the heifer suffered a miscarriage and three weeks later died as result of strain of carrying a calf at too young an age for breeding. The plaintiff thereupon brought an action for damages for breach of warranty. It was held *inter alia* that the stipulations in the catalogue and the conditions of sale protected the defendant as well as the auctioneer in respect of misstatements and misdescriptions in the catalogue. Scott L. J. also made the following observation at page 105:

"The printed condition that the vendor will take no responsibility for errors of description of things or animals specifically offered for sale on inspection is reasonable for visible defects but for qualities or attributes which are invisible, it is not reasonable. It may well become a mere trap for the unwary. The point deserves consideration by the Auctioneers." Associations".

10. Reference was made by the learned Counsel for the respondents to another case which is reported in the same volume (1947 1 All ER 328) *Lud-dit v. Ginger Coote Airways Ltd.* In this case, three passengers who were travelling in an aeroplane were injured as the result of an accident. The aeroplane caught fire during the flight. The three passengers injured brought an action for damages for the injuries sustained. The trip ticket under which they were travelling contained a Clause that the passenger travels "at his own risk against all casualties". It was held by the Judicial Committee that this Clause protected the carriers. Lord Wright in reading the judgment of the Board relied on certain observations of Viscount Haldane in *Grand Trunk Ry. Co. of Canada v. Robinson*, 1915 AC 740 at p. 747: (AIR 1915 PC 53 at p. 55) which were to the following effect:

"There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on a mere invitation or permission from the Railway Company without more and he receives injury in an accident caused by the neglect of its servants, the Company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract or of a duty imposed by the general law and, in the latter case, as in form, a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England, in different ways be superseded by a specific contract which may either* enlarge, diminish or exclude it. If the law authorises it, such a contract cannot be pronounced to be unreasonable by a Court of justice. The specific contract with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties and the plaintiff cannot by any device of form get more than the contract allows him".

Although this was a case of a common carrier and it is well known that the rights and obligations of a carrier stand on an altogether different footing from those with which we are concerned in the present case, the observations of Viscount Haldane are of some assistance in so far as they lay down certain general principles which should be applied in construing clauses in particular contracts.

11. Mr. Roy Choudhury also placed reliance on the case of *Gibaud v. Great Eastern Ry. Co.* (1920) 3 K. B. 689. It was held in this case that;

"A condition in a railway cloak room ticket purporting to exempt the railway company from liability for articles above a specified value deposited in the cloak room except on certain terms, and assented to by the person taking the ticket, is not prevented from being part of the contract and from protecting the company merely because it is unreasonable, provided that it be not so extravagant as to imply, and there is no other evidence to show, that that person's assent to it has been obtained by fraud, or so irrelevant as to be foreign to the contract".

The nature of the Clause which was relied on in this case was to the following effect:

"The Company will not be, in any way, responsible in respect of any article deposited, the value whereof exceeds ₹5 unless at the time of deposit the true value and nature of the articles shall have been declared and for every ₹1 sterling of the declared value be paid for each day or part of a day in addition to the ordinary cloak room charges".

The plaintiff in that case took his bicycle which exceeded ₹5 in value for depositing in the cloak room, but had not declared its value, and left the bicycle in front of the door of the cloak room. The bicycle was stolen owing to the neglect of the officer in charge of the cloak room and the plaintiff thereupon brought an action against the Company and contended that the particular Clause was unreasonable in character and, therefore, afforded no protection to the

Company. Bray J. made the following observation at page 700:

"In my opinion, once it is found that a party has expressly or by his conduct assented to the conditions, he is bound by these conditions just as much as if he had signed a written contract containing them and it is no answer to say that they are unreasonable unless, he can prove that his assent has been obtained by fraud".

Sankey J, at page 703 dealt with the point thus:

"There may be conditions on 3 receipt or a ticket given under circumstances like the present and constituting a contract, which do not bind a person to whom it is given, but that is not because such conditions are unreasonable, but because they are so extravagant as to amount to fraud or so irrelevant as to be entirely foreign to the contract which the parties are making. An instance of the first might be found in a case where the person handing such a receipt to the other party inserted in it a condition which no honest man would think of inserting and no ordinary man would dream of finding there; as for example, that the article deposited should be forfeited if not reclaimed in live minutes. An instance of the second might be found where there was a condition quite foreign to such a contract; as for example, where before the depositor was entitled to reclaim the article deposited he should become a share-holder in the company's undertaking. The first of these conditions would be a fraudulent and the second an irrelevant one and neither would be binding".

It appears to me that Clause 4 of the conditions of sale with which we are concerned was really designed to protect the seller in cases where there, is no such fundamental mistake or misdescription as going to the root of the contract and taking away the very foundation of the transaction. If, for example, instead of 200 bales which are purported to be sold at an auction sale, there is found to be only two bales in the lot which is put up for sale, it could hardly be contended that the purchaser would be bound by such a transaction because in such a case the discrepancy will be so gross as to strike at the very foundation of the contract although it may be that such a contingency is not likely to happen inasmuch as even a casual inspection or examination of the goods would reveal the actual state of affairs. In the example that I have cited, the representation of the seller could hardly be regarded as an innocent misrepresentation. The discrepancies however, in the present case do not appear to us to be of such a nature that we should regard the transaction as not coming within the protection afforded by Clause 4 of the conditions of sale. I, therefore, hold that this Clause 4 furnishes a complete answer to the claim of the appellant.

12. The next point which has been urged by Mr. Chitterji is that until delivery of the goods was taken from the godown of the railway, the sellers were in the position of bailees and they had all the liabilities of a bailee and if they cannot account for all the goods, they are bound to pay damages to the appellant for the loss arising out of short delivery of the goods. The learned Counsel has

placed reliance on Section 148 of the Indian Contract Act which defines the expressions, "bailment", "bailor" or "bailee" and on the explanation appended to that section which is as follows:

"If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee and the owner becomes the bailor of such goods although they may not have been delivered by way of bailment".

The learned counsel has also placed reliance on the second proviso of Section 26 of the Sale of Goods Act in support of his argument that the respondents in this case were in the position of bailees and, therefore, were bound to take reasonable care in respect of the goods as an ordinary prudent owner would do when the goods are in his custody. It appears to me that there is no force in this contention of the learned counsel. The explanation to Section 148 of the Contract Act makes it clear that a Seller can become a bailee if he contracts to hold the goods as a bailee. In the absence of such a contract, he cannot be regarded as a bailee. No contract, either express or implied, of bailment has been proved in this case. So this provision in the Contract Act is of no assistance to the appellant. Section 26 of the Sale of Goods Act reads as follows:

"Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not:

Provided that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault:

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party".

It is clear from the provisions of Section 26 that the second proviso applies to a case where the seller or the buyer holds the goods in the capacity of a bailee either under a contract of bailment or under circumstances which give rise to the relationship of bailor and bailee. The second proviso means that the operation of the provisions of Section 26 is excluded when the buyer or the seller happens to hold the goods in the character of a bailee. There is no automatic bailment created by operation of law as is suggested on behalf of the appellant. In the instant case, conditions Nos. 4 and 5 which provide that the lots will be at the risk and expense of the purchaser from the moment the sale is declared and condition No. 1 which states that "Cash in full on the fall of the hammer and delivery to be taken within fifteen days" are inconsistent with the position of there being any relationship of bailor and bailee between the appellant and the respondent after the sale was effected. From the moment of the fall of the hammer, the goods were at the risk of the purchaser who was at liberty to remove the goods at once or within a period of fifteen days from the date of sale. The seller had no liability from the moment of the sale except perhaps the duty

of affording facilities to the purchaser for taking delivery of the goods within a period of fifteen days from the date of sale. Reference was made by the learned counsel for the appellant to the decision of Blackburn J. in the case of *Sweeting v. Turner*, (1872) 7 Q. B. 310. In this case, the defendant who was an auctioneer sold certain goods for the plaintiff, the owner, on premises occupied by the plaintiff and another and in respect of which the latter owed the landlord rent, By the conditions of sale, each lot was taken to be delivered at the fall of the hammer after which time it was to remain at the exclusive risk of the purchaser. After the sale and before the floods were removed, the landlord threatened to distrain on the goods whereupon the auctioneer paid the rent and deducted it from the amount the goods had realised and paid over the balance to the plaintiff. It was held that the auctioneer was not justified as against the plaintiff in paying the rent as on the sale of each lot the property passed to the purchaser who would have to bear the loss if the landlord had distrained. The clauses in the conditions of sale were different from the clauses which we have to consider in the present case and as the observations of Blackburn J. were made in relation to the particular facts of the case which were before him, the case does not afford any real assistance to the appellant so far as the construction of Clause 4 and other clauses of the conditions of sale in the present case is concerned.

13. Mr. Chatterji also drew our attention to the second proviso of Section 20 of the English Act, the wording of which appears to be slightly different from the second proviso of Section 26 of the Indian Act. The learned Counsel also made reference to certain paragraphs at p. 401 of Benjamin on Sale, 8th Edition, in support of his contention that apart from any express contract of bailment, there may be circumstances under which relationship of bailor and bailee may arise between the parties to a particular transaction. It is not necessary to set out in detail these passages for the purpose of this case. The propositions there laid down are well settled.

14. The learned counsel also placed reliance on the case of *Mitchell v. Lancashire and Yorkshire Rly. Co.* reported in (1875) 10 Q. B. 256 but that was a case of a carrier who was also holding the goods entrusted to its custody as warehousemen. The observations of Field J. make it quite clear that as the railway company was holding the goods as warehousemen, their position in law was that of a bailee. As it is well known that the position of warehouse men is invariably that of a bailee, the principles laid down in this decision are not of any help to the appellants before us. It may be pointed out that although a good deal of argument was addressed to us on this question of bailment, curiously enough no case of bailment has been made in the plaint and there is no pleading of any negligence in the plaint. No issue was raised before the trial court on this point nor was any evidence adduced. In fact, no suggestion even was put forward in course of cross-examination about this case of bailment nor was any argument addressed before the trial court on this point. The notice given u/s 80 of the Code has been exhibited in this case and it does not also appear therefrom that any such case of bailment or negligence in the matter of taking care of the goods

is even hinted at. The appellant should not, therefore, be permitted to rely on this case of bailment and, as I have pointed out already, the materials on the record do not justify us in coming to the conclusion that the respondents were in the position of bailees or that they had any duty or obligations as such.

15. The last point that has been argued before us relates to the question of damages. The learned Judge has found that the plaintiff has not satisfactorily proved the damages claimed in this suit. The learned Judge has given his reasons for coming to such a conclusion. He has observed that the goods in question were excess, unclaimed and refused jute goods which were very old and lying in the godowns for a pretty long time. The evidence makes it clear that such goods could not be sold in the market unless they were mixed up with some other jute. The only evidence that had been given before him was as to the value of jute of average quality but the goods with which we are concerned cannot be described as of such average quality. The best evidence that the appellant could adduce was actual transactions of sale put through by him in respect of these goods which he had purchased at the auction but no attempt was made to prove such transactions by production of his books or otherwise. The learned Judge has also given other reasons in coming to the conclusion that the plaintiff had failed to establish satisfactorily his case as to damages before him. We see no ground for not accepting the reasons put forward by him but we find it difficult to follow how he came to the finding that if damages would have been given, he would have given it at the rate of Rs. 12/- per maund. No basis for such calculation is indicated in the judgment nor is there anything in evidence to justify such a finding. It is possible that the learned Judge thought that in the absence of any satisfactory evidence, this was a reasonable rate at which the damages could be assessed in the present case and that is why he has mentioned that figure in his judgment,

16. In the result, the appeal must fail and it is accordingly dismissed with costs to the appearing respondent.

P.B. Mukharji, J.

17. I agree.