
(1955) 05 P&H CK 0007
In the Punjab And Haryana At Chandigarh
Case No : First Appeal No. 122 of 1952

Hira Lal and Sons and Another	Vs	APPELLANT
Aspirants Mills Majitha Road, Amritsar		RESPONDENT

Date of Decision : 10-05-1955

Acts Referred:

Limitation Act, 1908 — Article 115
Sales of Goods Act, 1930 — Section 60

Citation : AIR 1956 P&H 13

Hon'ble Judges : Falshaw, J; Bishan Narain, J

Bench : Division Bench

Advocate : M.R. Aggarwal, F.C. Mittal, S.C. Mittal, A.N. Grover and R.K. Aggarwal, for the Appellant; K.L. Gosain and A.C. Kapoor, for the Respondent

Final Decision : Allowed

Judgement

Bishan Narain, J.—This appeal has been filed by the defendant firm against a decree of the trial Court for payment of Rs. 5,513/8/- to the plaintiff firm as damages for breach of contract, and it will be convenient to give the facts of this case in Chronological order before dealing with the various points raised in this appeal.

2. The plaintiff firm carries on the business of manufacture and sale of laces and ribbons etc., under the name of Aspirants Mills, Majitha Road, Amritsar. The defendant firm also carries on the business of purchase and sale of laces etc. at Amritsar. On 25-5-1948 the defendant firm purchased 1,000 dozen of laces known as "Tara" laces at Rs. 17/8/- per dozen and 100 dozen laces known as "Fancy" laces at Rs. 28/- per dozen.

The purchasers paid Rs. 300/- as advance and it was agreed between the parties that it was open to the plaintiff firm to manufacture the goods and to supply the same as and when ready, but the entire quantity had to be supplied within three months, that is, till 25-8-1948. The plaintiff firm supplied certain quantities on the date of the contract and some more quantities on 29-5-1948 and 5-6-1948

and the defendant firm paid Rs. 3,177/- for the same which amount, it is alleged was short by Rs. 71/- of the price due under the contract.

The plaintiff firm then offered on 28-6-1948 200 dozen "Tara" and 30 dozen "Fancy" laces by means of a registered letter sent through an Advocate of this Court. This notice suggests that there was already a dispute between the parties because generally business people do not send notices through their counsel unless a dispute has already started. It is admitted that the offer was only for the supply of lace in one colour namely black and in no other colour.

The defendant firm similarly replied through their counsel on 6-7-1948 and refused to accept the goods offered unless they were supplied in assortment of colours as was previously done. The defendant firm also stated in this letter that the goods were seasonal and should have been supplied by the end of June as was orally agreed upon between the parties.

The plaintiff firm offered further supplies in the same black colour on 29-7-1948 without acknowledging the receipt of the letter sent by the defendants on 5-7-1948, but there is no doubt that the plaintiff firm had received the letter of the defendants in due course. The plaintiff firm then alleged that they sold part of the goods offered on 28-7-1948 under the terms of the contract at the defendants' cost and in fact informed the defendants by letter dated 6-8-1948 that they had sold 100 dozen "Tara" and 50 dozen "Fancy" and had incurred a loss of Rs. 750/- for which the defendants were held liable.

It is in this letter that the plaintiff firm stated that there was no term in the contract under which assortments of colours were to be supplied to the defendants, and in this very letter they offered the remaining quantities of ribbons due under the contract. The case of the plaintiff firm then is that the contract goods were sold between 7-11-1948 and 31-1-1949. On 18-8-1951 the plaintiff firm informed the defendant firm that the plaintiff firm had suffered a loss of Rs. 6,623/8/- which the defendants were liable to make good.

The present suit was filed on 25-8-1951 on a court-fee of Re. 1/- in the Court of the Senior Sub Judge, Amritsar, for the recovery of damages amounting to Rs. 5,623/8/- although in the body of the plaint it was stated correctly that the value for the purposes of court-fee and jurisdiction was the amount claimed from the defendants.

3. The defendant firm repudiated its liability to pay the amount claimed by the plaintiff firm and "inter alia" pleaded that (1) the suit was barred by time, (2) the plaintiff was guilty of breach of the contract, and (3) there was no sale of the contract goods, and in any case there was no sale in accordance with law.

4. These defences did not find favour with the trial Court and they have been reagitated by Mr. F. C. Mittal on their behalf in this Court.

5. I will first deal with the question of limitation. This plea is raised on two grounds. It is firstly argued that assuming that the defendant firm was guilty of

breach of contract in insisting on supply of goods in different colours, then the breach was committed on 5-7-1948 and that this breach was accepted as such by the plaintiff firm when it sold part of the contract goods on 24-7-1948.

The argument is that the cause of action accrued to the plaintiff firm on 24-7-1948 and therefore the suit which was filed on 25-8-1951 is barred by time under Article 115, Indian Limitation Act. The second aspect of the point of limitation that has been raised by the defendants is that the plaint was filed on 25-8-1951 with the court-fee of Re. 1/- and that the deficiency in the court-fee was made up on 12-10-1951 and, therefore, the suit was barred by time under Article 115, Limitation Act even if it be held that the cause of action accrued on the expiry of three months on 25-8-1948.

6. Now I shall deal first with the question of limitation based on the plea of anticipatory breach of contract. Now, the contract in the present case was for supply of certain goods within three months but it was agreed that these goods would be supplied as and when they were manufactured and the defendant firm was bound to take delivery and pay for the same as supplied as long as all the supplies were completed within three months.

Therefore it was not an instalment contract and the parties are agreed before us and the trial Court has also found that the present contract is only a contract for supply of fixed quantities within three months though its performance is divisible. The defendant firm took delivery of the quantities supplied on 25-5-1948, 29-5-1948 and 5-6-1948 and paid for the same, and there is no dispute regarding these supplies beyond Rs. 71/- claimed by the plaintiff firm.

The plaintiff firm then offered certain quantities on 28-6-1948 but the defendants refused to take delivery of the same and informed the plaintiff firm accordingly on 5-7-1948 and the reason for refusal that was given was "inter alia" that the goods were being offered only in one colour. The plaintiff firm then sold on 24-7-1948 part of these goods and some other goods which, according to the plaintiff, were contract goods to third parties.

Now, the defendant-appellants case is that the refusal to take the goods was on 5-7-1948 and assuming that this refusal amounted to breach of contract then the plaintiff firm accepted it as such by selling the goods on 24-7-1948 and therefore the contract was rescinded on 24-7-1948 as on that date the plaintiff firm accepted the position that the defendant firm had committed the breach. It is argued that the cause of action under these circumstances accrued to the plaintiff firm on 24-7-1948 and therefore the suit filed on 25-8-1951 is barred by limitation.

7. In reply Mr. K. L. Gosain reiterated the argument which was accepted by the trial Court that under the contract it was open to the plaintiff firm to supply the goods till 26-8-1948 and even though on 5-7-1948 the defendants had refused to take delivery of the goods in one colour it was open to the plaintiff firm to change its mind and supply the goods in assortment of colour till 26-8-1948, and

that being so according to him, the final breach occurred on 25-8-1948 and the suit was filed within time.

8. The contract is silent as to whether the contracted quantities were to be supplied in one colour or in assortment of colours. The plaintiff firm manufactures these goods in assortment of six colours. There is no reliable evidence on this record as to whether the quantities which were accepted by the defendants previously were in one colour or in assortment of colours although the plaintiff firm in their letter dated 6-8-1948 did not specifically deny the defendants allegation in the letter of 5-7-1948 to the effect that previously goods were supplied in assortment of colours.

The facts, however, remains that the defendants refused to accept the contract goods in one colour and gave the necessary information to the plaintiff firm on 5-7-1948. The plaintiff firm considered this refusal to accept delivery of goods in one colour as a breach of contract and sold part of the goods that had been offered to the defendants to third parties and claimed damages from the defendants by letter dated 24-7-1948.

The question therefore arises whether this breach related to the remaining portion of the goods or only to the quantities then offered. There is no doubt that after the sale of the goods which had been appropriated by the plaintiff firm towards this contract to third parties it became impossible for the plaintiff firm to supply the entire contract goods to the defendants by 25-8-1948 and a supplier cannot insist on supplying goods in a quantity smaller than the quantity that he had contracted to supply and the buyer is not under any obligation to accept goods in a quantity less than the quantity contracted for.

Moreover, admittedly the goods that were offered subsequent to 28-6-1948 were only of one colour and admittedly they were rejected by the defendant firm on the same ground that is that the goods being only of black colour and not of assortment of colours they were under no obligation to accept them.

9. Now, the law relating to the anticipatory breaches of contract is laid down in Section 60, Indian Sale of Goods Act which reads-

"60. Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach."

10. Mr. Mittal contends that the plaintiff firm treated the contract as rescinded on the date that it sold the goods of this contract to third parties. He has further contended that admittedly the present contract was not an instalment contract and therefore Section 38(2), Sale of Goods Act is not applicable and therefore the repudiation of 5-7-1948 by the defendants cannot be considered to be limited only to the quantities then offered, and his contention is that the repudiation relates to the entire contract.

11. The defendants have been refusing the goods on the ground that they were being supplied in one colour. In my opinion this ground went to the root of the contract and was not peculiar to the particular offer dated 28-6-1948. If the defendants' contention was correct then it affected the entire contract and not the particular offer particularly when the plaintiff firm was equally insistent that it was within its rights to supply goods in one colour only, Coleridge C. J. laid down in -- "Freeth v. Burr", (1874) 9 CP 208 (A): the test to be applied in such cases in these words:

".... In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract.

that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

12. A similar rule was laid down by Bigham J. in -- "Millar's Karri & Jarrah Co. (1902) v. Weddel, Turner & Co." (1908) 24 Com Cas 25 (B)

"Thus, if the breach is of such a kind or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded," and this observation was cited with approval by Das J. in -- "Chhedilal Hariniwas v. Britover Ltd." 52 CWN 45 (C). In my opinion the ground given for refusal by the defendants on 5-7-1948 went to the root and foundation of the whole contract.

Undoubtedly, insistence on performance of a contract in a different way or on different terms from what the contract requires is repudiation, and assuming that the contract enabled the plaintiff firm to supply the goods in one colour the defendant's insistence that the goods must be supplied in assortment of six colours amounts to repudiation of the contract. Assuming that the ground of refusal given by the defendants was contrary to the terms of the contract then the defendants were responsible for repudiating it.

It is, however, well settled that the repudiation or renunciation of a contract by one of the parties before the time for performance has come does not itself put an end to the contract for the reason that there cannot be renunciation of a contract by unilateral repudiation, and this is recognised by Section 60, Sale of Goods Act which gives the other party a right to treat it as subsisting or to elect to treat as rescission of the contract.

In the latter case he immediately becomes entitled to damages. The question therefore that now requires consideration is whether the plaintiff firm treated the renunciation by the defendants assuming it to be wrongful as renunciation of the entire contract which remained to be performed on 3-7-1948, and whether the plaintiff firm chose to treat the contract as subsisting or rescinded.

Now, undoubtedly the plaintiff firm having, received the defendant's repudiation sold the goods which had been appropriated to the contract to third parties. It sold 100 dozen "Tara" and 50 dozen "Fancy" on 24-7-1948. It will be noticed that on 28-6-1948 the plaintiff firm had offered 200 dozen "Tara" and 30 dozen "Fancy". Thus the plaintiff firm sold "Fancy" in greater quantity than offered on 28-7-1948.

This conduct of the plaintiff firm indicates not only that the plaintiff firm elected to consider the whole contract having been rescinded and did not consider the rejection to be limited to the particular quantity offered, but also that it became impossible for the plaintiff firm to supply the entire quantity of the contract goods to the defendants on or by 25-8-1948 as part of the goods had already gone out of the control of the plain. "till firm.

Moreover, the plaintiff firm gave notice on 21-7-1948 (Ex. P. 11 that unless delivery of the goods offered on 28-6-1948 was taken within a week they would be bold at the defendant's risk. The goods, however, were sold on 24-7-1948, that is, before the expiry of even that week and therefore the election had taken place before the expiry of one week. Undoubtedly, the plaintiff firm sold the goods at the defendant's risk which had not yet been offered to them and claimed Rs. 750/- as damages "vide" the plaintiff's letter dated 6-8-1948 (Ex. P. 12).

The only reasonable inference that can be drawn from this act and conduct of the plaintiff firm is that they elected to treat the remaining of the contract as rescinded on 24-7-1948 because it is difficult for me to imagine a more positive act showing acceptance of anticipatory repudiation than the sale of goods to third parties.

13. Mr. Gosain, however, contended that the plaintiffs even after the sale of the goods offered the "balance quality" of the contract goods on 6-8-1948 and that shows that the plain tiffs did not elect to rescind the contract and kept it alive till 25-8-1948, and it was further urged that it was still open to the plaintiffs to supply the goods according to the contract or as demand ed by the defendants if the plaintiffs had chosen to accept the construction of the contract suggest ed by the defendants. There is no force in this contention.

Admittedly, the goods offered on 21-7-1948 and on 6-8-1948 were only of black, colour and there was no suggestion at any time that the plaintiffs accepted the defendant's position, that the goods could be supplied in assorted colours in the present case. The unsuccessful attempt of a buyer to induce a seller to perform after he had announced his intention not to do so cannot be considered to amount to keeping the contract alive for the benefit of both parties, vide -- "C. Alien v. Wolf River Lumber Co." (1919) 9 ALR 271 (D).

The general principle of election is that once the election is made freely and with knowledge of all facts there can be no going back on it and it becomes irrevocable. Therefore, once the repudiation is accepted a contract is rescinded

and there cannot be any revival of the contract except by another agreement of both the parties, vide Haroon Tar Mohammad and Co., v. Bengal Distilleries Co., Ltd. ILR (1948) Cal 11 at p. 46 (E).

14. For these reasons I am of the opinion that assuming the defendants insisted on performance of the contract in a way different from the terms of the contract the defendants repudiated it on 5-7-1948 and this repudiation was treated by the plaintiffs on 24-7-1948 as rescinding the contract. The result is that the plaintiffs on 24-7-1948 became entitled to damages for breach of contract and, therefore, the cause of action accrued to the plaintiffs on that date, and the present suit filed on 25-8-1951 is barred by time under Article 115 Indian Limitation Act.

15. Mr. Mittal has also argued the second aspect of the question of limitation on the ground that the suit was filed with wholly inadequate court-fee of Re. 1/- on a plaint which claimed a decree for Rs. 5,623/8/- and no explanation has been given by the plaintiffs for filing the suit without proper court-fee. This raises a rather difficult question because under Order 7. Rule 11 (c). Civil Procedure Code, the Court is bound to grant time to the plaintiff when the plaint is written upon paper insufficiently stamped for making the deficiency good, and u/s 149, Civil P. C. when the deficiency in court-fee is made good it relates back to the date on which the plaint was filed.

The question arises whether when a Court grants time in the absence of the plaintiff which is beyond the period of limitation the plaintiff is entitled to the benefit of Section 149, Civil P. C., or not. It is, however, not necessary to decide this matter in this case as I have already held the suit to be barred on another ground.

16. On the merits also the plaintiff firm has no case and even if it be assumed that the defendants committed breach of the contract the plaintiff firm has failed to prove on this record that it has suffered any damages. In the present case the claim for damages was based on a difference between the contract price and the price realized on sale of the contract goods to third parties.

There is no doubt that under Clause 4 of the contract the plaintiff firm had a right to sell the goods, but the question that arises is whether the plaintiff firm had manufactured the contract goods and whether it had sold them to third parties within reasonable time as contemplated in Section 54(2), Sale of Goods Act. If there was no anticipatory breach of the contract, then it was necessary for the plaintiff firm to prove that they were ready and willing to perform their part of the contract, that is, supply the goods within three months before they could claim damages.

It is true that the plaintiff firm offered the goods by the means of a letter but that does not necessarily show that the plaintiffs had manufactured the goods or had the contract goods in their possession. Hari Chand, the plaintiff stated in Court on 2-4-1952 that he kept a production register but on the next date of

hearing, that is, on 4-4-1952 he stated that he did not keep a stock register and also stated "I cannot say even today from any books as to when and how much of the goods in question were ready", although he proceeds to say that the goods when he gave the final notice were ready. .

It is difficult to believe the plaintiff in this respect when he refuses to produce the books which he must be keeping. It is Incredible that the plaintiff firm which was doing the business of manufacture of ribbons and laces and was selling them wholesale would not keep a stock register or a produce register. I am, therefore, of the opinion that the plaintiff firm has failed to prove that it was in a position to deliver the goods to the defendants on 25-8-1948. The resale of the goods also indicates that the plaintiffs had no goods because, as I will show later, they have not proved that they had really sold any of the contract goods.

17. As regards the resale the evidence produced by the plaintiff firm is wholly inadequate to prove the resale. The plaintiff firm alleges that on 24-7-1948 100 dozen "Tara" and 50 dozen "Fancy" laces were sold to one Sundar Singh but it has not cared to produce this purchaser in Court although it admits that he is alive. It is significant that Sundar Singh admittedly had no previous dealings with the plaintiff firm and " it is really doubtful if a man of that name doing business in these goods exists. The second sale of 200 dozen "Tara" is alleged to have been made to Piara Lal (P.W, 2) who carried on his business in Delhi.

This witness has no account books and the plaintiff firm had had no dealings with him previous to this transaction. The plaintiff firm expects me to believe that in spite of the fact that it did not have any dealings previously with P.W. 2 it left 165 dozen of "Tara" worth more than Rs. 2,000/- with him to be sold on commission basis without taking any security from him. This witness is so friendly with the plaintiff that he travelled all the way from Delhi to Amritsar to attend the Court without even getting any summons.

He was unable to produce pass-books which could show that he had an account with a bank. This witness has no account and it is from his mere "ipse dixit" that one should believe that he is interested in this particular business. It is impossible to believe that a person who keeps no account books or has no account with any bank should be in a position to purchase goods on payment of more than Rs. 2,000/- cash or that the plaintiff firm should leave goods worth more than Rs. 2,000/- with him to be sold in future on commission basis.

I have no hesitation in rejecting the testimony of this witness. The third person to whom part of the goods are alleged to have been sold is Harnam Singh (P.W. 3). This witness is also of the same type as Piara Lal (P.W. 2). He has no books of account and he voluntarily travelled all the way from Delhi to Amritsar without receiving any summons from Court and I reject his testimony also. Thus the plaintiff firm has failed to prove that any of the contract goods were sold to third parties and, therefore, the damages claimed on the basis of resale remain unproved.

Moreover, according to the plaintiff firm, during June and July the prices of these goods were rapidly falling and yet it did not sell these goods till November and considering that these goods are seasonal and are supposed to be sold during summer I am definitely of the opinion that the goods were not sold within reasonable time, and that would be another ground for rejecting the resale as basis for calculating damages.

18. Mr. Gosain then made a request that the plaintiff firm be given an opportunity to prove damages by proving the difference between the market rate and the contract rate on the date of the breach. In this case, however, the defendants had objected to the genuineness of the resales from the beginning and still the plaintiff firm did not claim damages on an alternative basis. This is not a case where resales are being rejected on some technical grounds but on the finding that the plaintiff firm never resold any of the contract goods.

Moreover, the present suit was not filed promptly and no explanation has been given why the plaintiff firm waited till the last day of limitation for filing this suit. In the circumstances I see no reason for remanding this case in 1955 for proof of market price in 1948. I, therefore, reject the request made by Mr. Gosain.

19. For all these reasons I would accept this appeal and dismiss the plaintiff's suit with costs throughout.

Falshaw, J.

20. I agree.