

(1959) 09 CAL CK 0013
In the Calcutta High Court
Case No : Suit No. 702 of 1948

India Red Lead Factories Co.

APPELLANT

Vs

Pursottamdas Narsingdas

RESPONDENT

Date of Decision : 15-09-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 30 Rule 1
Limitation Act, 1908 — Section 22
Sales of Goods Act, 1930 — Section 36, 36(2), 60

Citation : AIR 1960 Cal 327

Hon'ble Judges : A.N. Ray, J

Bench : Single Bench

Advocate : M. Hazra and M. Dhar, for the Appellant; S.S. Roy and S. Tibrewal, for the Respondent

Judgement

A.N. Ray, J.—This is a suit for the recovery of Rs. 29647/9/3 as damages and a sum of Rs. 4401/12/9 as the amount lying with the defendant out of the sum of Rs. 48000/- paid by the plaintiff to the defendant as and by way of payment in advance towards the price of 60 tons of pig lead.

2. The plaintiff's case is that by a contract entered into in the month of January 1947, the defendant agreed to sell and the plaintiff agreed to buy 120 tons of pig lead of Australian origin at Rs. 39/ 120/- per cwt. ex defendant's godown. The terms alleged by the plaintiff in paragraph 1 of the plaint are, inter alia, as follows :

(a) The defendant would deliver to the plaintiff the said 120 tons of pig lead in two lots of 60 tons each;

(b) The plaintiff would pay the defendant the price of each lot of 60 tons at Rs. 39/12/- per cwt.

(c) The defendant would give delivery of the aforesaid lot of 60 tons to the plaintiff immediately after full payment of the price of the said 60 tons at the said

rate;

(d) The remaining quantity of the second lot weighing 60 tons to be delivered to the plaintiff after delivery of the first lot of 60 tons;

(e) The full value of the remaining quantity of 60 tons at the contract rate to be paid by the plaintiff after delivery of the first lot of 60 tons to the plaintiff.

3. On these terms the plaintiff alleges that on 16-1-1947 the plaintiff advanced to the defendant a lump sum of Rs. 48,000/- which covered more than the full value of the price of the first lot of 60 tons. In paragraph 3 of the plaint it is alleged that it was further agreed between the parties that after debiting the plaintiff with the full value of the first lot of 60 tons at the contract rate against the sum of Rs. 48,000/- advanced by the plaintiff the balance would be carried over to the credit of the plaintiff and appropriated towards part payment of the price of the second or remaining lot of 60 tons of pig lead.

4. In paragraph 5 it is alleged as follows : "The plaintiff at the request of the defendant extended the time for delivery from time to time and accommodated the defendant to deliver the said goods in instalments within a reasonable time."

5. In paragraph 7 it is alleged as follows : "By a letter dated 6-9-1947 in wrongful breach of the contract the defendant refused to deliver the remaining portion of the said goods, namely, 65 tons 3 cwt. 0 qr. 21 lb. 4 oz. within a reasonable time or at all."

6. In paragraph 8 the plaintiff alleges that by reason of the terms the plaintiff has suffered loss of Rs. 29,647/9/3 being the difference between the contract rate of Rs. 39/12/- per cwt. and the market rate on 8-9-1947, the date of the breach in respect of delivery in terms of the contract.

7. Counsel on behalf of the defendant raised preliminary objection as to the competency of the plaintiff's cause of action with regard to damages on the grounds, first, that there was no pleading of agreement of extension of time for delivery of the goods and secondly, that there was no pleading that there was extension of time up to any defined point. Counsel for the defendant also contended that the plaintiff's claim with regard to Rs. 4401/12/9 was barred by limitation by reason of the fact that the plaintiff originally instituted the suit against Pursottamdad Narsingdas a firm and by an amendment dated 4-9-1953 the Karta of the joint Hindu Mitakshara family was included as a defendant. The contention was that it was not a case of mis-description which was cured by an amendment but that it was a case of bringing to the record a new party and as such the suit would be barred by limitation on 4-9-1953. I should indicate here that when the amendment was allowed the question of limitation was left open to be canvassed at the trial.

8. When the case came up for hearing a few weeks ago the aforesaid objections were indicated by counsel for the defendant. Counsel for the plaintiff thereupon asked for an adjournment of the suit in order to apply for an amendment of the

plaint. Eventually counsel for the plaintiff stated that the plaintiff did not want to amend the plaint in any manner whatever. Counsel for the plaintiff also stated that the plaintiff could not state on oath that there was any agreement of extension of time on any particular date or up to any particular date.

9. As to the plaintiff's claim for damages the questions to be considered are, first, whether there is any pleading that there was an agreement for extension of time for delivery; secondly, whether there is any pleading that the time for delivery was extended up to any definite point of time; thirdly, whether the plaintiff can ask for damages without acceptance by the plaintiff of the repudiation of the contract by the defendant and fourthly, whether the plaintiff is entitled to claim damages on the basis of rates prevalent on 8-9-1947.

10. The plaintiff's claim in paragraph 1 of the plaint is that 60 tons were for immediate delivery. The remaining 60 tons were to be delivered after delivery of the first lot of 60 tons. The contract was entered into in the month of January 1947. The term being for immediate delivery, delivery was to be in the month of January 1947 or within a reasonable time from the date of the contract. Reasonable time is always a question of fact. If there was no case of extension of time for delivery it would have to be found out as to what would be the reasonable time for delivery when the contract was entered into in the month of January 1947 for immediate delivery.

11. It is not the plaintiff's case that there was to be the delivery within a reasonable time after the entering into of the contract. It is the plaintiff's case that at the request of the defendant the plaintiff extended the time for delivery from time to time. That is paragraph 5 of the plaint. Counsel for the plaintiff contended that the plaint should be read to mean that there was an agreement between the parties that the extension of time was for delivery within a reasonable time.

12. Paragraph 5 consists of two parts. The first part pleads that the plaintiff at the request of the defendant extended the time for delivery from time to time. The second part of paragraph 5 is that the plaintiff accommodated the defendant to deliver the said goods in instalments within a reasonable time. Counsel for the plaintiff contended that paragraph 5 should be read along with paragraph 7 of the plaint as meaning that there was an extension of time for delivery within a reasonable time. Paragraph 7 leads to repudiation of the contract by the defendant by not delivering within a reasonable time or at all. Paragraph 7 does not, in my opinion, show that there was an agreement for extension of time. Reasonable time is to be determined with reference to a particular point of time. It may be that reasonable time will be calculated with reference to the date of formation of contract. It may be that reasonable time will be determined with reference to the time for delivery. To illustrate, if the contract be entered into in the month of January and if there is no specific term for delivery it will have to be ascertained as to what would be the reasonable time for delivery with reference to the date of the contract. If the term be "delivery in the month of January*" or "immediate

delivery", reasonable time would have to be determined with reference to the point of time for delivery. If it be suggested that there is an extension of time for delivery within a reasonable time, it is in my opinion, impossible to predicate as to what would be the reasonable time for delivery unless it is pleaded that delivery was to be within a reasonable time from a determined factor like the date of the contract or any specified time of delivery. The plaintiff's case is not that the defendant should have delivered within a "reasonable time from the date of the contract or within a reasonable time from the specified term of immediate delivery. The plaintiffs case is that the time for delivery was extended from time to time. The plaintiff contended that the pleading should there fore be read as an agreement for delivery within a reasonable time. I am unable to read paragraph 5 of the plaint as pleading that there was an agreement for extension of time for delivery within a reasonable time. Paragraph 5 of the plaint does not show up to what period or point of time there was an extension of time to enable the court to find out as to what will be the reasonable time to deliver the goods. It is always a question of fact as to what is reasonable time.

13. Counsel for the plaintiff relied on a passage at page 241 in Pollock and Mulla's Indian Sale of Goods Act and Indian Partnership Act 2nd Edition under the heading "extension of time". It is stated there that "an agreement to postpone the performance for an unspecified time operates as an extension for a reasonable time and consequently the date to be taken must then be a date at which there appears to be failure or refusal to perform. Counsel for the plaintiff relied on the decision of AIR 1922 178 (Privy Council) , as an authority for the proposition. The decision in 48 IA 175 : AIR 1922 178 (Privy Council) was a case where there was an extension of time up to a particular date. No difficulty arises where the extension is up to a specified date for that substituted date must hold good for all parties. Lord Dunedin observed that the seller might approach the buyer to agree to the goods being delivered at a date later than the date named and the buyer might agree. Conversely the buyer might go to the seller and suggest that the date of delivery Should be postponed and the seller might agree. In such cases the contract is not put an end to and the vendor is bound to deliver at a later date. As Lord Dunedin observed:

"where a specific time is stated then that substituted date must hold. If there were a simple waiver of the right to extension of the original time, then a reasonable time would be the proper time for delivery,"

14. In my opinion the decision in 48 IA 175 : AIR 1922 178 (Privy Council) and the comments in Pollock. and Mulla's Indian Sale of Goods Act ,do not assist the plaintiff. The correspondence between the parties was also placed before me. It shows that the-plaintiff was asking for delivery and the defendant was contending that the defendant would deliver such goods as had arrived. The defendant also contended that the goods which had arrived were to be apportioned among several buyers. The correspondence in my opinion does not show that there was ever any agreement to extend the time. Mere forbearance

from suing or giving a formal notice is not enough to form an agreement for extension of time. Such an agreement cannot be founded on a unilateral, act of the promisee to extend the time of performance of his own accord and for his own benefit. Unless both the buyer and the seller agree there cannot be an extension of time. Counsel for the plaintiff was unable to show any correspondence recording such an agreement. The correspondence in my opinion does not show that there was any agreement to extend the time for delivery but that the plaintiff was making enquiries if goods had arrived and if the defendant could deliver. The defendant did not agree with the plaintiffs contentions. In my view there was never any agreement for extension of time for delivery.

15. Where the promisor fails to perform the contract at the stipulated time, it is open to the promisee to avoid the contract. If he does not avoid the contract, the fact of non-avoidance does not by itself change or alter the time of performance. There has to be an agreement between the two parties to extend the time for performance.

16. The next question is that there must be a new delivery date. It may be a stipulated date or if no date be fixed the delivery has to be performed within a reasonable time. Such reasonable time will then be determined with reference to the time up to which there has been agreement extending the time for performance. In such cases it is vital to plead the time up to which the time for performance was by agreement extended so that the term of delivery) as being within a reasonable, time and during the subsistence of the contract can be ascertained. In the present case there is, neither any agreement extending the time for performance nor any pleading that there was extension up to any particular time for delivery within a reasonable time.

17. The other question is whether paragraph 7 of the plaint discloses sufficient cause of action for the plaintiff. The plaintiff's case is that the defendant repudiated the contract. It is not pleaded that the plaintiff accepted such repudiation. Counsel for the defendant in my opinion rightly contended that in the absence of acceptance by the plaintiff of repudiation of the contract by the defendant, the plaintiff had no cause of action and the plaint did not disclose any cause of action. Counsel for the plaintiff contended that Section 60 of the Sale of Goods Act confers a right on the plaintiff to maintain the suit. Section 60 of the Indian Sale of Goods Act corresponds to Section 39 of the Indian Contract Act. Section 60 of the Indian Sale of Goods Act is as follows:

"Where either party to a contract of sale repudiates the contract before 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."

18. Counsel for the plaintiff contended that the institution of a suit was enough to show that the plaintiff treated the contract as rescinded and the plaintiff could therefore sue for damages.

19. In the case of *Heyman v. Darwins* 1942 A.C. 356 Lord Simon observed at p. 361 of the report as follows:

"The first head of the claim in the writ appears to be advanced on the view that the agreement is automatically terminated if one party repudiates it. That is not so."

20. "I have never been able to understand," said Scrutton L.J. in *Golding v. London and Edinburgh Insurance Co. Ltd.* (1932) 43 L.L.R. 487.

"What effect the repudiation of one party has unless the other party accepts the repudiation. Repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation on the one side, and acceptance of the repudiation on the other."

20a. Lord Macmillan at p. 371 of the report observed. :

"One of the parties to a contract evinces by his conduct or openly declares his intention not to fulfil his obligations under the contract. He is then commonly said to have repudiated the contract . . . Where there has been such repudiation by one party of his contract obligations the other party may either acquiesce and betake himself to a claim of damages for breach or may contest the repudiation, but if his protests are unavailing, as he cannot in general enforce specific implement, his only remedy in the end is also a claim of damages for breach Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone: But, even if the so-called repudiation is acquiesced or accepted by the other party, that does not end the contract. The contract stands, but one of the parties has declined to fulfil his part of it."

20b. Lord Wright at p. 378 of the report observed as follows :

"Repudiation of a contract is sometimes used as meaning that the defendant denies that there ever was a contract in the sense of an actual consensus ad idem Another case to which repudiation is applied is when the party, though not disputing the contract, declares unequivocally that he will not perform it, and, admitting the breach, leaves the other party to claim damages Perhaps the commonest application of the word "repudiation" is to what is often called the anticipatory breach of a contract where the party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission but only as far as concerns future performance. It remains alive for the awarding of damages either for previous breaches or for the breach which constitutes the repudiation."

21. It is essential that when repudiation takes place the contract is alive. A contract will be kept alive by agreement of parties. If the original stipulated time

for performance has expired, parties can by agreement extend it up to a later date. Repudiation by a party takes place during the subsistence of the contract. The other party will then accept the repudiation and rescind the contract. In the present case there is no pleading nor is any agreement established that the contract was alive at the time of repudiation. Nor is there any pleading that the plaintiff accepted the repudiation.

22. Counsel for the defendant also relied on the observation of Lord Wrenbury in the case of *Bradley v. M. Newsom, Sons and Co.* reported in 1919 AC 16 : "If one party to the contract, by words or by conduct, expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance, the latter may say. "I take you at your word; I accept your repudiation of your promise, and will sue you for breach".

23. First, there has to be a repudiation of the contract by the defendant, secondly, acceptance by the plaintiff of the repudiation and thirdly, the consequence is rescission of the contract by the plaintiff. The rescission is the result of repudiation and acceptance of repudiation. Unless both co-exist there cannot be a rescission, nor can there be a cause of action for repudiation of the contract.

24. In the present case as I have stated there is no pleading that there was acceptance of repudiation. It is true that there can in some cases be acceptance of repudiation by the institution of a suit. In the case of 1942 AC 356 Lord Simon observed that the issue of the writ might sometimes be regarded as amounting to exercise of the plaintiff's claim to rescind and for the purpose of that appeal Lord Simon was pleased to regard it so. In the present case the issue of the writ itself cannot be regarded as a rescission for the reason that the suit is instituted on 28-2-1949 whereas damages are claimed as on 8-9-1947, Paragraph 7 pleads that the defendant refused to deliver within a reasonable time. If paragraph 7 be construed to mean that the defendant refused to deliver within a reasonable time since 8th September the suit becomes premature in the sense that the plaintiff claims damages as on the 8th September without allowing reasonable time to deliver. If it be construed to mean that the defendant should have delivered within a reasonable time namely, by the 8th September, then as I have already indicated the contract was not extended up to the 8th of September. Suppose it were extended up to the 8th of September and the defendant wanted to repudiate the contract on the 8th of September even then the defendant would get a reasonable time thereafter. From no point of view can it be suggested that on the 8th September there was either acceptance of repudiation or any rescission of the contract.

25. Paragraph 8 of the plaint which alleges the date of breach as the 8th of September is in my view inconsistent with the case made in paragraph 7 of the plaint that repudiation was on 8/9 September. The letter itself of the defendant is dated 8/9 September 1947. It is common document being plaintiff's document No. 16 and defendant's document No. 14. Obviously there cannot be any claim

for damages on the basis of the 8th of September. Repudiation itself is not dated until 8/9 September means the 9th of September. From that point of view this suit does not disclose any cause of action and the suit is incompetent.

26. As to the plaintiff's claim for Rs. 4401/12/9 counsel for the defendant contended that the same was barred by limitation. The suit was originally filed against a joint family firm. On 4-9-1953 there was an amendment and Bithaldas Binani for self and Karta of a Joint Hindu Mitakshara family was brought on the records of the suit. The question of limitation was left open by amendment. Counsel for the defendant contended that it was not a case of mis-description but it was an addition of new parties. I feel that the matter is concluded by certain decisions. His Lordship Mr. Justice S. R. Das in the decision of *Re Arbn. Munshilal and Sons Vs. Modi Bros.* dealt with three questions. First, as to whether an award for or against a Hindu joint family in its trading name is valid, secondly, whether judgment can be passed under Indian Arbitration Act for or against a Hindu joint family business in its trading name upon an award in favour or against it, thirdly, whether judgment can be passed upon such award for or against the members of the joint Hindu family individually or their Karta as such. At p. 573 of the report his Lordship observed that a contract entered by a joint Hindu family business in its trading name is a good and valid contract recognised by law and independently of the provision of O. 30 there was and is no difficulty in enforcing the same in a properly constituted suit in a Court of law. His Lordship was of the view that a joint family in its trading name cannot either sue or be sued. While dealing with this point his Lordship Mr. Justice Das referred to the case of *Ramprasad Shivalal Vs. Shrinivas Balmukund*, and the case of *Amulakchand Mewaram Vs. Babulal Kanlal Taliwala*, His Lordship Mr. Justice Das approved of the observations of Macleod C. J. that a suit originally instituted against a joint family business in its trading name when amended by substituting the names of the individual members of the business was not an addition of parties but only a substitution in order to correct the mis-description.

27. His Lordship Mr. Justice Sarkar in the case of *Hajee Sattar Hajee Peer Mohamed v. Khusiram Banarsilal* reported in ILR (1952) Cal 153 has taken the same view. I respectfully agree with the view of their Lordships Mr. Justice Das and Mr. Justice Sarkar that an Amendment bringing the members of the family in place of trading name of the family is merely correcting a mis-description. In the case of *Hajee Sattar Hajee Mahomed* ILR (1952) Cal 153 the suit was instituted by the plaintiff describing himself as Hajee Sattar Hajee Mahomed a firm and the words "a firm" were alleged to have been inserted by mistake and on that allegation the plaintiff sought to delete the words "a firm" in the cause title leaving the rest of the plaint as it was. Counsel for the defendant made two points, first, that the present case is not one where the plaintiff brought on record the joint family firm by mistake and secondly, that this is not a case of the same plaintiff but of new persons being brought on the record of the suit. I must proceed on the basis that amendment has been properly allowed. As to the second point counsel relied on the decision of the Appeal Court reported in M.B.

Sirkar and Sons Vs. Powell and Co., . That was a case where a suit was instituted against the firm. In place of the firm the company was sought to be brought on record. A firm and a company are two distinct legal entities. The Appeal Court took the view that it would not be a case of mis-description. It would be useful to cite what their Lordships observed in that case :

"It is true that if the case be one of mis-description, no question of limitation or destruction of any valuable right already accrued to the appellant company arises. But it will be useful to consider first what "misdescription" really means. A case can properly be said to be a case of mis-description when the party, really intended to be impleaded, had always been the same and such intention appeared clearly for the body of the plaint in spite of the inaccurate description in the cause title and what an amendment does, in such cases, is not to add a new party to the suit or substitute a new party for the original one, but to make the identity of the party originally impleaded clearer by amending or rectifying the inaccurate description. When the same person, whether an individual or a legal entity, remains the defendant but only the name is altered, there is a case of amending a misdescription. But where a new legal entity is substituted for another it cannot correctly be said that the original error was a mere misdescription and that by the amendment, no change of a substantial character affecting the right of any party is being effected."

A joint family trading name, his Lordship Mr. Justice Das has observed, can be used for certain purposes but it cannot be used either by the proposed plaintiff or against the intended defendant. In other words the provisions of Order 30 are not attracted to joint family trading names. What the plaintiff has done in my view is merely to insert a wrong name of the defendant, a name which can be used for trading purposes but not for the purposes of procedure in court. The persons behind the cloak of the assumed trade name are there. Their trade name cannot be used in a Court of law either for suing or for being sued by that name. In such cases what the plaintiff proposes to do is to say that instead of the wrong name the persons forming the name should be brought on record. I am unable to agree with the contention of the defendant that such would be a case of bringing new parties. The parties are already there in their trading name. Only the trading name or the mask is taken off and the real persons are brought on record.

28. In the result I am of opinion that the plaintiff's claim for damages should fail and the plaintiff is entitled to a decree for Rs. 4401/12/9. Counsel for the defendant had admitted practically at the opening of the case on the first day that his client would pay the amount of Rs. 4401/12/9 but counsel for the plaintiff was not willing to accept the position. There will be a decree for Rs. 4401/12/9. This is a case where I am of opinion that the parties should pay and bear their own costs.