
(1945) 01 CAL CK 0025
In the Calcutta High Court
Case No : Suit No. 207 of 1944

Jagadish Prosad Pannalal

APPELLANT

Vs

Produce Exchange Corporation Ltd.

RESPONDENT

Date of Decision : 03-01-1945

Acts Referred:

Citation : (1945) 01 CAL CK 0025

Final Decision : Dismissed

Judgement

Sen, J.—On 16th September 1943 the plaintiff firm entered into a contract with the defendant company for the purchase of one wagon of maize starch at the rate of Rs. 77 per cwt. f. o r. Jagadhri. The maximum price then fixed by the Government of India for the commodity was Rs. 78 per cwt. The goods were loaded on railway wagons at Jagadhri on 27th December 1943 by the defendant company. In the railway receipt the defendant company was the consignee. On 3rd January 1944, the railway receipt was endorsed over to the plaintiff firm and the plaintiff paid the balance of the price of the goods on that date. In the meantime, on 16th December 1943, a new order was passed by the Government of India making Rs. 48 the maximum price. This order was applicable to all contracts in which delivery was to be given on or after 1st January 1944. The plaintiff seeks to recover the difference between the contract price of Rs. 77 per cwt. and the maximum price of Rs. 48 per cwt. fixed by the order of the Government of India. In the plaint, the allegation was that the defendant company suppressed the fact that such an order had been passed and was guilty of misrepresentation. That charge is now abandoned. The plaintiff firm also claimed that the defendant company could not charge more than Rupees 47 per cwt., i. e., Re. 1 less than the maximum price. That claim is also abandoned. The plaintiff now claims the difference between the contract price and the price fixed by Government and the claim is based on the following two grounds, viz.: (1) The contract having become void by reason of the new Government order, the defendant is bound to make compensation to the plaintiff or restore the advantage it has got under the contract. Sections 56 and 65, Contract Act, are

relied upon for this branch of the argument. (2) The payment in excess having been made by mistake the defendant is bound to refund it. Section 72, Contract Act, is invoked in support of this contention.

2. The defendant company's defence is that delivery having been given on 27th December 1943 when the goods were loaded on railway wagons the new order did not apply and therefore, no refund is payable. The second line of defence is that even if it be held that excess payment had been made, it is not recoverable as it was made by reason of a mistake of law and not of fact.

3. The first question for determination is whether the new order applies to this contract. If there was delivery on 27th December 1943 then admittedly the order does not apply. If, however delivery be taken to have been made on 3rd January 1944 then, again admittedly, the order would apply. Mr. B. C. Ghose for the defendant argues that the contract being f. o. r. Jagadhri delivery took place as soon as the goods were loaded on the railway wagons at Jagadhri in terms of the contract and he referred me to Ss. 2 (2), 23 (2) and 39, Sale of Goods Act.

4. Section 2 (2) defines delivery as the voluntary transfer of possession from one person to another. Certainly, possession was given to the railway company on 27th December and there was delivery to the railway company on that date when the goods were loaded on the wagons. But we are concerned here with the question of delivery to the buyer. Can it be said that such delivery to the railway amounted to delivery to the buyer ? Mr. Ghosh argues that it does, because delivery to a carrier for transmission to the buyer is prima facie deemed to be delivery to the buyer. He refers to S. 39 (1), Sale of Goods Act, which is in the following terms :

Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody is prima facie deemed to be a delivery of the goods to the buyer.

He meets the objection that the railway receipt was made out in the name of the defendant company as consignee by saying that this act merely reserved to the consignor a right of disposal and that this reservation did not prevent the delivery of the goods to the railway from amounting to delivery to the buyer. He refers to S. 25, Sale of Goods Act, and points out that there may be delivery although the vendor retains a right of disposal. On behalf of the plaintiff, the argument is that as the defendant was the consignee in the railway receipt it cannot be said that the goods were put on the railway for transmission to the buyer.

5. There can be no doubt that there may be delivery to the buyer even though the seller retained right of disposal in the goods delivered; but the mere putting of goods on the railway wagons does not necessarily amount to delivery to the buyer. The section says that the goods must be delivered to the carrier for

transmission to the buyer. The section further says that such delivery to the carrier would prima facie be deemed to be delivery to the buyer; the use of the words prima facie shows that even if there be delivery to the carrier for transmission to the buyer circumstances may exist which would prevent such delivery from amounting to delivery to the buyer. Here the consignee was not the buyer but the seller. The goods were, therefore, being transmitted to the seller and not to the buyer. It cannot be said that the railway had been directed to carry the goods to the buyer and that the seller merely retained some right of disposal. The railway was directed to deliver the goods to the defendant company and not to the plaintiff firm. In such a case delivery to the railway company cannot be deemed to be delivery to the buyer. The order passed under the Defence of India Act would, therefore, affect this contract. The next question for determination is whether the plaintiff can recover the difference between the contract price and the price fixed by the Government order. I shall first consider the argument of the plaintiff which is based on Ss. 56 and 65, Contract Act. It is argued that the contract became void by reason of the provisions of S. 56. Section 56 so far as it relates to the present question is as follows:

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

6. Learned counsel for the plaintiff contends that the contract between the parties became void when the order under the Defence of India Act was passed making it unlawful for any one to charge a price exceeding the price fixed by the order. He then contends that as the contract became void the defendant who has received an advantage under the contract in the way of the price for the goods in excess of what it was entitled to receive is bound to refund the excess. For this purpose he relies on S. 65.

7. Now did the contract become void on 16th December 1943, when the order was passed fixing the maximum price of the goods at Rs. 48 per cwt.? On that date it was made unlawful for any one to charge any price in excess of Rs. 48 per cwt. inasmuch as the order provided that anyone charging more was liable to be imprisoned. It was argued on behalf of the defendant that the contract was not unlawful but that only a term of it was made unlawful and that the contract could still be performed by the payment of the price fixed by the order. I am not impressed by this argument. The main term of the contract had become unlawful. The contract as entered into between the parties could not be performed without infringing the law. Payment of a lesser sum than that fixed by the contract would amount to the alteration of the contract in its essential term and to the substitution of a new contract for the old one. Suppose the defendant company had refused to sell at the new reduced price could the plaintiff firm have forced it to sell? In my opinion it could not. The order under the Defence of India Act does not contain any such compelling provision; no statute has been shown to me under which the defendant could be so compelled, nor can such

compulsion be supported on any principle of justice or equity. The contract, as it stood, could not be performed without infringing the law and it, therefore, became void on the date of the promulgation of the afore, (said order under the Defence of India Act. The next question is whether on this account the plaintiff would be entitled to recover the difference between the contract price and the price fixed by the order by invoking the aid of S. 65 which is in the following terms:

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

In my opinion, the answer must be in the negative. Section 65 deals with two matters: (a) an agreement which is discovered to be void and (b) a contract which becomes void.

8. The first matter is concerned with an agreement which never amounted to a contract because it was void ab initio, the fact of its being void being discovered at a later stage. The word used is "agreement" and not contract. I would also stress the use of the word "discovered" in the first part of the section in contradistinction to the word "becomes" in the second part. The word "discover" connotes the pre-existence of that which is discovered. We are not concerned with such a case. The second matter deals with a contract (i. e. with an agreement enforceable at law) which was good at its inception but which becomes void at some later stage by reason of some supervening circumstance. We are concerned with such a case. Now what the section says is that if anybody receives any advantage under such a contract he is bound to restore it or make compensation for it when the contract becomes void. The advantage must have been received under the contract. Now a contract is an agreement enforceable at law (see S. 2 (h), Contract Act). The advantage must, therefore, have been received under an agreement enforceable at law. If the advantage is received after the agreement ceases to be enforceable at law, i. e., ceases to be a contract, can it be said that it is an advantage received under the contract? I think not. The section applies only if the advantage is received before the contract ceases to be a contract by becoming void. In this case it was received after and, therefore, the section does not apply. This view finds support in the decision of the Bombay High Court: 44 Bom. 631 Wolf & Sons v. Dadiba, Khimji & Co. ("20) 7 A. I. R. 1920 Bom. 192 : 44 Bom. 631 : 58 I. C. 465. I next take up for consideration the argument that the sum claimed is recoverable under S. 72, Contract Act, as having been paid under a mistake. Section 72 is as follows:

A person to whom money has been paid, or anything delivered, by mistake or under coercion must repay or return it.

9. On behalf of the defendant the argument is that S. 72 contemplates only a mistake of fact and not one of law. It is said that if a sum paid under a mistake

of law be recoverable then the provisions of S. 21, Contract Act, would be rendered nugatory. Section 21 enacts that a contract is not voidable because it was caused by a mistake as to any law in force in British India. The argument of the defendant, therefore, amounts to this: a contract is not voidable by reason of its being caused by a mistake of law, therefore, a payment made under a mistake of law must be irrevocable. Put thus it seems to me that this argument is not supported by logic. Section 72 uses the word "mistake" without any qualification. Is there any justification for engrafting a qualification which is not in the Statute ? The basic rule in construing a statute is to give the words of it their ordinary grammatical meaning. One must not depart easily from this rule. I am not unmindful of another principle of construction, viz., that one must always endeavour to give effect to every part of a statute and adopt, whenever possible, a construction which has this effect in preference to a construction which would render a part of the statute nugatory. Both these principles should be worked in harmony. Now if the word mistake in S. 72 is given its ordinary meaning, viz., a mistake of any kind - an unqualified mistake - does any conflict necessarily arise between that section and S. 21 ? I think not. Section 21 speaks not of a payment made under a mistake of law but of "a contract caused by a mistake of law." Section 72 does not speak of a contract at all but merely of a payment made under a mistake. The section appears in Chap. V, which does not deal with contracts but "with certain relations resembling those created by contract." As I read it, all that S. 72 says is this:

If a person makes a payment under a mistake (of law or of fact) a relationship resembling a contract is created under which the person receiving the payment is bound to return the money.

A payment may be made by mistake without there being any contractual relationship at all between the parties. A may pay a sum to B under the mistaken belief that he is in law bound to maintain B. Here there is no contract between the parties voidable or otherwise. If the law declares such a payment refundable, it does not in any way conflict with S. 21 as no contract is involved. Again a payment may be made in the course of a contract under a mistake of law without such payment being the "cause of the contract." In such a case also, the refund of that payment would not render S. 21 nugatory. That section deals only with mistakes of law which "cause a contract" or which give birth to a contract; it has nothing to do with any other kind of mistake. If, therefore, a payment made under a mistake of law is not the origin of a contract such payment would be refundable under S. 72. This is how I would construe S. 72. I think that a certain amount of confusion has been caused by reason of the importation of the English common law rule regarding the recovery of payments made under a mistake. The English common law rule that a payment made under a mistake of law is not recoverable can have no application here, where there is a statute governing the question. I would, therefore, respectfully disagree with the dictum of Lord-Williams J., in 39 C. W. N. 174 *Katherine Stiffles v. Carr Makertich Martin* ("35) 39 C. W. N. 174 at p. 185. This dictum is based on the assumption that the

English Common law doctrine regarding this subject is applicable to India.

10. The question remains whether in this case the plaintiff is entitled to recover the sum claimed. Can it be said that the difference between the contract price and the maximum price fixed by the Government order represents a payment made by the plaintiff by mistake ? In my opinion it cannot; when the contract became void, the plaintiff could have refused to pay anything at all and in that case he would have had to return the goods. If he paid the contractual sum in ignorance of the fact that the contract had become void that would be a payment by mistake. He could then recover the entire amount paid and return the goods. Here the entire contractual price has been paid by mistake. The plaintiff cannot be permitted to split up the payment made in the way he seeks to do and to treat a part only of such payment as being a payment made by mistake refundable under S. 72. To do so would be to permit the plaintiff to enforce a new contract on the defendant company. As I have pointed out before, the Government order contains no such compelling clause, it merely prohibits the sale above a certain maximum price but it does not compel anyone to sell at that price. I hold, therefore, that the plaintiff cannot seek the aid of S. 72, Contract Act, in the manner in which it has sought to do. This suit must, therefore, be dismissed with costs. Certified for two counsel.