

(1924) 12 CAL CK 0028
In the Calcutta High Court

Jatindra Chandra Banerjee

APPELLANT

Vs

Murlidhar

RESPONDENT

Date of Decision : 22-12-1924

Acts Referred:

Contract Act, 1872 — Section 116

Citation : 94 Ind. Cas. 873

Hon'ble Judges : Ewart Greaves, J;Chakravarti, J

Bench : Division Bench

Judgement

Chakravarti, J.—The defendant appeals against the judgment of Mr. Justice Buckland delivered on the 11th December 1923 decreeing the suit of the plaintiff for refund of the purchase-money of certain goods.

2. The facts are shortly these: On the 13th October 1922 the plaintiff purchased from the defendant ready goods, three cases of Black Italian for Rs. 6,002 5,6 and took open delivery of the goods on the same day from the god-owns of Messrs. Cox & Co. in three boxes of which two had already been opened and two pieces were taken out for samples. It is the plaintiff's case that the pieces were counted at the time of delivery and no question was then raised that there was any deficiency in the goods or that the goods were not up to the sample.

3. It appears that the defendant on his turn had purchased the said goods from Cox & Co. and in fact on the same day paid Rs. 5,402-2-0, to Cox & Co. the price for which he had purchased the goods.

4. The goods continued in the possession of the plaintiff and on the 9th November for the first time the plaintiff wrote to the defendant that the goods were found tender (i.e. rotten). The defendant replied to this letter on the 10th alleging that the open delivery of the goods were taken after examining them in the presence of the broker and no objections were taken before that date. Then after demand for refund of the purchase price, this suit was brought on the 26th January 1922.

5. The defendant in his written statement stated that the delivery of the goods was taken after full inspection and that the plaintiff had no right to reject the goods and that the "alleged rejection was not made within a reasonable time."

6. A number of issues were raised and the only claim in the issues was for refund and not for damages.

7. The evidence adduced in the case was not so full as it might be, but that was owing to the fault of the parties and consequently the learned Judge had to decide the matter on the record as it was. It appears that the goods were surveyed by a professional surveyor who made a report on the 27th November 1922 and Mr. H. R. Stark, the surveyor was examined in the case and proved his report.

8. The learned Judge found upon the evidence that the sale was by sample and that the goods were rotten and unsaleable. Further the learned Judge has found that the plaintiff had no reason to suspect between the 13th October and 7th November that the condition of the goods was unsatisfactory and that in the circumstances of the delay in claiming rejection of the goods was not unreasonable. Then the, learned Judge held that the plaintiff exercised no act of ownership beyond keeping the goods in his godown. On these findings the learned Judge made a decree in favour of the plaintiff directing a refund of the money claimed.

9. Sir B.C. Mitter for the appellant con-, tended that the plaintiff has made out no case for damages and his only case was for refund of the purchase-money and that case should fail because the plaintiff exercised acts of ownership by selling the goods and there was unreasonable delay before the plaintiff complained against the soundness of the goods. The learned Counsel further contended that assuming that the plaintiff was entitled to claim damages the plaintiff has failed to prove what the damages really were. It was further contended that the goods were according to sample and that the defect in the goods, if any, was a latent defect and that u/s 116 of the Contract Act the defendant was not liable to pay damages. In support of his last contention he strongly relied upon the report and the deposition of Mr. Stark.

10. As to the first point, Mr. Pugh for the respondent, at the very outset stated that he would not press his claim for refund and he would be content with a decree for damages and that as the value of the goods was only Rs. 50 he asked for a decree for the amount claimed less that amount.

11. It appears to us that in the circumstances, the plaintiff could not claim a refund of the purchase-money, his remedy if any would be by way of damages and not refund.

12. It further appears to us that the plaintiff alter he took possession of the goods, exercised acts of possession as an owner when he sold some of the goods on the 25th and 26th of October to sub-purchasers who according to the plaintiff

returned the goods to him as unsaleable. We are not satisfied that the delay in rejecting the goods was a reasonable delay and that after exercising acts of ownership in the goods the plaintiff could not claim refund of the purchase-money.

13. We agree with the learned Judge in his finding that the goods were not saleable and their value was only Rs. 50 as established by the evidence of Mr. Stark and there was no rebutting evidence on the point. There was an alternative claim for damages in the plaint and evidence was led on this point.

14. The most important point is the question as to whether or not the defect in the goods was a latent defect within the meaning of Section 116 of the Contract Act.

15. The report and the evidence of Mr. Stark conclusively show that on outward view the goods appeared to be perfect. I quote a passage from his report where he says:

An examination of the cloth in 3 and 4 was made and although the paper wrappers and tape which secured same appeared in perfect orders, the cloth itself, which also appeared on inspection to be undamaged was when tested by tearing found to be partially rotten.

The state of the cloth which renders it of little value and quite unacceptable by the buyers for sound goods is due, in my opinion, to the effect of the fumes from some substance like bleaching powder.

16. The vendor failed to detect the defect when open delivery of the goods was taken and in fact it was not detected until along time after when the sub-purchasers returned the goods. There can then be no question that the defect was one which was not obvious to the eye and could not be detected without testing the strength of the cloth.

17. There is no suggestion that the vendor was guilty of any fraud in the matter. In fact he bought the goods as they were lying in the godowns and made only a small profit on the bargain and there was no special warranty for quality by the defendant?.

18. Section 116 of the Contract Act runs as follows: "In the absence of fraud and of any express warranty of quality, the seller of an article which answers the description, under which it was sold is not responsible for a latent defect in it".

19. The word "latent defect" is not defined in the Act. Taking the illustration as a guide, it seems clear that the word " latent defect " means a defect which is not obvious to the eye and is not apparently noticeable.

20. The English Sales of Goods Act defines the word but that is of little help to us in construing a different Act. The learned Counsel for the plaintiff did not contend that the defect was not a " latent " one within the meaning of Section 116 but he contended that Section 116 did not apply to a case of sale by sample. No

authority for this proposition was cited before us. On a careful reading of the sections of the Contract Act beginning with Section 110 to Section 116 we find nothing in them which would suggest that the operation of Section 116 is limited in that way.

21. We are, therefore, of opinion that the defendant is not liable for damages for a defect in the goods which was a latent one within the meaning of Section 115 of the Contract Act.

22. The result, therefore, is that this appeal is allowed and that the plaintiff's suit should be dismissed with costs in all Courts.

Ewart Greaves, J.

23. I agree.