

(1937) 12 CAL CK 0021
In the Calcutta High Court

Joseph Mayr

APPELLANT

Vs

Phani Bhusan Ghose

RESPONDENT

Date of Decision : 21-12-1937

Acts Referred:

Sales of Goods Act, 1930 — Section 16

Citation : AIR 1939 Cal 210

Hon'ble Judges : Derbyshire, C.J.;Ameer Ali, J

Bench : Full Bench

Judgement

Derbyshire, C.J.—This is an appeal from a decision of Lort-Williams J., delivered on 29th May 1936, wherein he gave judgment for the plaintiff for Rs. 4000 and costs and made a declaration that the plaintiff was entitled to reject a boiler with accessories. The plaintiff, the present respondent, carries on business as an ink and sealing-wax maker under the name of the Bengal Industrial Company at Cossipore, a few miles out of Calcutta. The defendant, a German gentleman, for some years had carried on business in Calcutta as a manufacturer's agent and an import-merchant dealing mainly in papers, stationery and machinery for making paper. The parties for some years previous to 1932 had business dealings with each other. In 1932, the plaintiff wished to start the manufacture of carbon paper and with that object in view, he consulted the defendant from time to time, and the defendant assisted him with advice, and also procured same formulae for the preparation of carbon-paper. In 1932, the plaintiff bought through the defendant a machine for winding and cutting paper and also a steam-kettle for preparing the ink to be used on the machine for the purpose of making carbon-paper. In the process of making carbon-paper, the paper itself is wound from reels through a trough of ink and then on to another reel. Some of the rollers over which the paper passes are heated in order to make the paper more receptive to the ink and more retentive of the ink afterwards. Apparently, the idea originally was to warm the rollers with gas flames. It does not appear that that procedure was ever adopted on a manufacturing scale, and some time in 1933 the plaintiff discussed the matter with the defendant and was advised by

him that the better way would be to heat the rollers, with steam. Steam is also used for heating the steam-kettle in which the ink is prepared. Eventually an order was placed by the plaintiff with the defendant for a steam-boiler. At a later stage, the plaintiff contended that the winding machine, the steam-kettle and the boiler were all unsuitable and claimed the right to reject the boiler, and also damages in respect of the failure of the machine and the steam-kettle. The learned Judge has found that the machine and the steam-kettle were in conformity with the contract; but that the boiler did not conform to the contract. We are therefore only concerned in this appeal with the question of the boiler. The boiler itself was ordered by the plaintiff from the defendant on an order form of the defendant on 23rd June 1933. It is described in the order form as:

(One) Low pressure steam and hot water boiler "Perfekt" No. 2, as per enclosed prospectus, but of two qm. heating surface, 600 mm. diameter height of shell 1,520 mm. and total height about 1,700 mm. with fittings and mountings consisting of:

Various other accessories.

Terms of delivery : in one lot as quick as possible.

Shipment - to Calcutta through Roehlig and Company.

Payment - 60 days after delivery.

Making up - in English with "Made in Germany" inscribed thereon.

The total price of the machinery and the accessories 850 R.M. net, including packages F.O.B. Continental Port.

2. On the back of the order-form there are terms and conditions only one of which is relevant, now No. 16, which reads:

No claims by me or us are to be entertained unless such claim be made in writing within 14 days from the arrival of goods.

3. The plaintiff signed that order-form. Along with the order-form, the plaintiff received a little pamphlet printed in German with sketches showing the outline of the boiler and also a diagram indicating the internal construction of it. That document in German was translated and sent to the plaintiff before the contract was made. I need only refer to two portions of that pamphlet. The translation of the first portion reads as follows:

The execution of our boiler system complies with its designation as a boiler of quality. Fire box and boiler body are made of Siemens - Martin Ingot iron thoroughly welded. The great strength and elasticity of this material guarantee safe working and a long life of the machine. Every boiler is tested under a water pressure of 6 Atm. The outside casting of the fire box and all the heavy armatures are made of cast iron. For the delicate armatures we use only the very best material in heavier execution.

....As a safety arrangement, the boiler possesses a device which does not allow the maximum steam pressure to expand to more than 0"5 Atm. The usual control, armatures, water gauge with testing tape, manometer, safety valve and different closing apparatus serve to control the working of the boiler. With this equipment a boiler of any size can be mounted even in occupied rooms. The plant does not need to come under the supervision of the board of control of steam-boilers.

4. The boiler itself was delivered to the plaintiff in Calcutta on 20th October 1933, and was taken by him to his works at Cossipore and thereafter installed so as to form part of the plant for making carbon-paper. The plaintiff paid the defendant for the boiler in two instalments - the first on 13th November 1933, and the second on 14th December 1933. The plant was erected and the defendant tells us (at p. 119 of the paper-book) that he saw that the boiler was fitted up, that smoke came out from the chimney, that steam was produced and that the needle of the pressure gauge showed some pressure (how much pressure is not stated). Beyond that, it does not appear to have been used. Sometime in February 1934, a question arose as to whether this boiler satisfied the requirements of the Boilers Act and the Regulations made thereunder. These Regulations have the force of law. The defendant took the question up with the Inspector of Boilers, Bengal, but no certificate under the Boilers Act was ever issued by the boiler inspecting authorities in respect of this particular boiler. It is now clear from the evidence given at the hearing before the learned Judge by the Chief Inspector of Boilers, Bengal, that the boiler did not satisfy the requirements of the Boilers Act and the Regulations made thereunder, because both the longitudinal seams of the boiler and the circumferential seams were welded, and also the boiler plates themselves were too thin in that they were below the minimum thickness allowed under the Indian Boilers Act which is 7". The consequence was that the boiler was never used beyond the raising of steam in the way I have mentioned, and eventually it was discarded. We were told in the course of the argument before us that no boiler was bought to replace it till 1937.

5. It is alleged by the plaintiff that he has been unable to make any profit from producing carbon-paper and he has claimed damages for that loss of profit. The plaintiff alleges that he made known to the defendant the purpose for which he required a boiler and that he relied upon the defendant's skill and judgment to supply him a boiler reasonably fit for the purpose. He also alleges that the defendant verbally, (I use the words set out in para. 2 of the amended plaint),

simultaneously agreed and undertook that the said boiler would not come under but would be exempt from the operation of the Indian Boilers Act and the Rules and Regulations of the Government of Bengal in connexion therewith and that in case it turned out thereafter that the said boiler would come under the operation of the Indian Boilers Act and the Rules and Regulations of the Government of Bengal in connexion therewith, then he would do all that would be necessary for

having the same registered in accordance with the Indian Boilers Act and for securing permission or certificate authorising the use of the said boiler so that the plaintiff might use the same for the purpose required by him.

6. The defendant's case amounts to a general denial. Before us, an attempt was made to set up condition No. 16 as a bar to the plaintiff's claim. This point was not taken before the learned Judge and we do not feel justified in allowing that point to be taken here. We have been taken through the evidence that has been given by both parties and their witnesses in this case. The learned Judge felt himself unable to place reliance on the personal testimony of the defendant. After considering the evidence, I feel the same difficulty about relying on the personal testimony of the plaintiff. I reach that conclusion because of the plaintiff's answer to questions Nos. 170 and 171. It seems to me clear that the plaintiff there was - putting it mildly - not being frank with the Court having regard to his letter of 3rd January 1934 to the Controller of Printing and Stationery for India in Calcutta and the reply of the Controller of Printing and Stationery, for India in Calcutta of the same date. For these reasons, I am: unable to rely upon the plaintiff's personal testimony. Furthermore, if any such undertaking: by the defendant, as is alleged in para. 2 of the amended plaint, had been made, I am of the opinion that it would have been put into the order-form, which formed the document of contract between the parties. I am unable therefore to infer from the evidence that there was an express undertaking by the defendant that the boiler should conform to the requirements of the Boilers Act and the Regulations thereunder and I am of the opinion that I must look at the order-form of 23rd June and the circumstances under which the contract was made in order to see what the contract between the parties was.

7. There is no doubt upon the evidence, and it has not been denied by the defendant, that the plaintiff did go to the defendant for advice with regard to the setting up of the working of the carbon-paper plant, and my view is that the plaintiff made known to the defendant the purpose for which the machinery was required and did rely upon the defendant's skill and judgment in the matter. I think the plaintiff probably noticed that the fire-box and the boiler body were welded, but I doubt whether he realized the significance of that. I think the plaintiff noticed the paragraph which said : The plant does not need to come under the supervision of the board of control of steam-boilers. That clearly referred to control of boilers in the country of origin of the boiler, namely Germany. I think something was said about the requirements of the authorities here with regard to boilers. But as I have said, I am not able to come to the conclusion that there was any express undertaking given by the defendant that the boiler would conform to the requirements of the Indian Boilers Act and the Regulations thereunder. Both parties are presumed to have known the state of the law with regard to boilers in Bengal. I doubt whether they thought much about the matter at the time the boiler was ordered. What I do think is that the plaintiff was relying upon the defendant supplying him with a boiler, which he could use in connexion with his carbon-paper plant at his factory at Cossipore.

The plaintiff contends that u/s 16, Sale of Goods Act, there is an implied condition that the boiler should reasonably be fit for the purpose for which it was supplied and that it was not reasonably fit for that purpose, in that it could not, according to law, be used for that purpose. There is, as I have said, very little evidence as to how far the boiler in itself was physically fit for the purpose. Steam was raised in it, but we are not told to what pressure. That is all We know about the fitness of the boiler in itself. The question is: Was that boiler unfit for the purpose for which it was supplied by reason of its construction and the provisions of the Boilers Act?

8. There is no reported case which deals with a matter like this. A case has been cited which appears to have some resemblance to it in certain respects. It is the case in *Sumner Permain & Co. V. Webb & Co.* (1922) 1 K.B. 55. That was a case u/s 14, Sub-section 14(2), Sale of Goods Act in England, which corresponds: to Section 16, Sale of Goods Act in India. The short facts there were (as extracted from the head note):

The defendants, manufacturers of mineral waters sold to the plaintiffs a quantity of tonic water, under the description of "Webb's Indian Tonic" to be delivered f.o.b. London. The water, as the defendants knew, was bought for the purpose of shipment to the Argentine. Among the ingredients of the water there was, unknown to the plaintiffs, a certain percentage of salicylic acid. By a law of the Argentine the sale of any article of food or drink containing salicylic acid was prohibited but the defendants had no knowledge of that law. On the arrival of the water in the Argentine the authorities, finding it contained salicylic acid, condemned it as unfit for human consumption.

9. This was a contract made in England to be performed in England. In an action for breach of contract it was held that the fact that by reason of the local law the water was unsaleable in the country in which the defendants knew that it was intended to be sold was not a breach of the implied condition that it should be of "merchantable: quality." In that case, the plaintiffs for some years had carried On business in the Argentine and they had sold this particular beverage and the defendants were the makers of that beverage in London. That case turned upon whether the goods were of a merchantable quality. In his judgment *Atkin L.J.* says:

It appears to me impossible to suggest that the seller under the warranty of merchantable quality warrants that the goods shall be capable of being sold in the particular place in which he knows that the buyer intends to resell them; in other words, warrants that there shall be no local legislation in that place prohibiting their sale. A case was put in argument which I think fairly illustrated what the contention of the sellers here amounts to. That contention must go the length of insisting that if a buyer, resident in the United States, where there is a complete legislative prohibition against the sale of alcohol, were to order from another country goods containing alcohol to be imported into the United States, the seller, must be taken to warrant that the goods are capable of being sold in

the United States. That proposition need only be stated to show that it is impossible that the Sale of Goods Act can have implied a warranty which would have such an effect. To my mind, the warranty extends no further than I have stated.

10. The case is interesting but it is not exactly in point because, as Atkin L.J. pointed out:

One has to remember when one is dealing with this subject that the matter is entirely independent of all questions as to whether the goods are fit for a particular purpose.

11. That particular question was left open, and it is not easy to answer it in the present case. The contract now under discussion was made in India between parties carrying on business in India for the purchase and delivery in India of a boiler to be used in India for a particular purpose known to and contemplated by both "parties. The policy of the Boilers Act is to protect those who have occasion to go near boilers. The policy is one of safety and when the Legislature intended that the Regulations made under the Boilers Act should have the effect of law, as in this case, it is difficult to resist the inference that if the Boilers Act and the Regulations made thereunder prohibit a particular type of boiler, then that boiler is in some way unfit for use. Boilers may be constructed in the way prohibited, but the Legislature for its own reasons has prohibited their use, and it is difficult for me, sitting as a Judge to administer the law, to say that the boilers constructed not according to the Regulations made under the Boilers Act are suitable for use as boilers in India. Any one who uses a boiler, which does not conform to the Boilers Act and the Regulations made thereunder, is liable to prosecution and a heavy penalty under the Boilers Act. It is difficult to say that a boiler which renders its owner and user liable to such penalty, is reasonably fit to be used as a boiler. Further, if the owner and user of a boiler prohibited by the Act and Regulations uses it and there is an accident owing to the boiler bursting and some one is injured, the owner and user is liable to damages for breach of statutory duty : see the case in *Groves v. Wimborne* (Lord)(1898) 2 Q.B. 402.

12. For these reasons, I am of the opinion that this particular boiler was not reasonably fit for the purpose for which it was ordered and supplied, namely for use in connexion with the carbon-paper making plant of the plaintiff at Cossipore. Consequently, in my view, the defendant was guilty of breach of contract. The learned Judge has found that the plaintiff was entitled to reject the boiler. I have looked at the circumstances and have come to a different conclusion. The boiler was delivered on 20th October and was paid for finally nearly two months later. It was erected and kept erected until some time in April following when the plaintiff purported to reject it. In my view, he had kept it too long to be in a position to be able in law to reject it. He must be deemed to have accepted it, and if he has a remedy against the defendant for breach of contract that remedy is one not of rejection but for damages. The question is what damages? The learned Judge awarded the plaintiff damages for loss of profit for

four months in 1934. I have not been able to discover from the evidence that in the year 1934 the plaintiff knew how to make usable the carbon-paper at all. This was an entirely new business venture on his part. He says that he made carbon-paper in 1935 and that he got a Government contract for it. No document of contract has been put in to support that statement, and I am doubtful whether he had any such document.

13. On the plaintiff's own story, unsupported by some documentary evidence, I am not prepared to say that he did get a Government contract for carbon-paper in 1935. There is no evidence that the plaintiff at any time made or was able to make but for lack of a suitable boiler carbon-paper at a profit. It seems to me that the plaintiff's claim for damages on the basis of loss of profit must fail. When the plaintiff found that he had been supplied with a boiler, which was unfit for his purpose, it was his duty as a business man, if he desired to go on with the manufacture of carbon-paper, with that kind of plant, to get rid of the unusable boiler and get one that was usable. There is no evidence at all of his trying to do this, and there is no evidence of his being unable to buy another boiler at or about that time. That aspect of the case has not been gone into by either side. In my view, if the plaintiff is to recover damages for breach of contract he can only recover them on the basis of the boiler being unfit for the purpose for which it was supplied to him and of his having to spend money to get one which was fit for the purpose. Those damages come under the following heads: (1) Expense incurred in removing the boiler in question and in installing another suitable one; (2) the difference between the price of another boiler suitable for the purpose which could be bought in April or May 1934 and the price he could get by the sale of the unusable boiler at the same time in 1934, and (3) a sum of money estimated to be the overhead charges in respect of the carbon-paper plant only, during the time necessarily taken up in removing the unusable boiler and installing a suitable one.

14. In my view, this appeal should be allowed on the question of damages and the matter should go back to a Judge other than the Judge who tried it, to deal with the question of damages on the lines I have indicated and it is ordered accordingly. Each party will pay its own costs both here and the Court below.

Ameer Ali, J.

15. I agree with the decision of my Lord the Chief Justice. I desire, however, to express a view on one point and that is with regard to implied warranties. The matter now remains within the domain of implied contract, having regard to the view expressed by my Lord as to express contract with which view I agree. With regard to implied warranty of merchantability u/s 16(2), Sale of Goods Act, the case has not been argued before us upon that basis. There was, in fact, a finding to the effect that the goods were not merchantable within the meaning of that provision. In my opinion however had there been an implied condition as to merchantability, as regards breach, the case in *Sumner Permain & Co. v. Webb & Co.* (1922) 1 K.B. 55 would have been an answer in law. With regard to implied

warranty of fitness u/s 16(1), we have found that the essential elements are present that is to say, disclosure of a particular purpose in a particular manner. There was therefore an implied warranty. Was there a breach of that warranty? The question depends on the scope of the warranty itself. To my mind, the first point to be decided is whether the warranty of fitness, implied by law, is logically different in principle from the warranty implied by law of merchantability.

16. It is perfectly true that in *Sumner Permain & Co. v. Webb & Co.* (1922) 1 K.B. 55 Lord Atkin expressly pointed out that the case was decided on the question of merchantability and not on the question of fitness for a particular purpose. It is also perfectly true that in the earlier case in *Niblett Limited v. Confectioners Materials Co. Ltd.* (1921) 3 K.B. 387 two learned Judges, who were also Judges in the case just mentioned, took a somewhat different view with regard to implied warranty as to merchantability. It is also true that the foot-note in *Sumner Permain & Co. v. Webb & Co.* (1922) 1 K.B. 55 at the least leaves the matter open. It is even a possible inference that the Court viewed the question of implied warranty of fitness in a different light. But, as a matter of principle, I have been unable to see any logical distinction between the two matters. It seems to me that the one condition as to merchantability requires the goods to be reasonably fit to be sold as goods of the particular description. The other condition, as to fitness, requires the goods to be reasonably fit for use for the particular purpose for which they were ordered, and that in both cases they are required to be intrinsically fit, and not fit having regard to some particular legislation or particular rules framed by the State or a third party. My view therefore is that *prima facie* fitness for a particular purpose means intrinsic fitness for the particular object to which the goods were to be applied. The question, to my mind, depends upon the scope to be given to the words "particular purpose." That governs the whole Section. The article is not to be fit generally, not to be fit, as pleaded, "for the purpose of the plaintiff"; it must be fit for a particular purpose notified to the defendant and notified in a particular way, so that the defendant shall know that his skill and judgment is relied upon to supply an article which shall be fit for that purpose.

17. I can conceive of a case where the purpose" might be given a more extended meaning, e.g. for the purpose of being used for heating cylinders in the plaintiff's factory and also of being passed by the boiler authorities. Even accepting that view, the pleadings and the evidence do not, to my mind, support it. In this connexion, I refer particularly to the last line of para. 1 and to the middle portion of para. 2. The purpose for which this article was required was "the improvement in the manufacture of carbon-paper." It does not say "for the purpose of being passed or tested by the boiler authorities or used lawfully." Nor do I think that the inference to be drawn from the evidence is that the plaintiff made known such extended purpose to the defendant in such manner as the latter knew that his skill and judgment was required to supply an article which would comply with the regulations. For these reasons, I prefer the narrower construction and take the view therefore that the mere fact that a license could

not be obtained is not ipso facto a breach of the implied warranty of fitness. The onus is on the plaintiff, not the defendant, to show that he is entitled to take advantage of implied warranty, and I myself feel that it is desirable, so far as possible, that people should put their contracts in writing and not depend upon implied warranties: see the observations of Lord Eussel in *Monforts v. Marsden* (1895) 12 R.P.C. 266. But what stands in the way of the appellant and makes my view ultimately conform with that of my Lord, is this: Was this boiler fit even for the narrower purpose? On Jhat, we have the fact that it was not passed by the authorities. That, at any rate, raises a presumption that it was not fit, having regard to the Regulations and their obvious purpose. It is my view that the presumption could have been rebutted, but there is no evidence which, to my mind, is sufficient to rebut it. It is true that there is evidence that the boiler did raise steam. That again has been referred to by my Lord. The only evidence which at all seems to help the defendant on this point is an answer to a question asked by the counsel for the plaintiff.

18. In the circumstances, I agree with my Lord that there is not enough to rebut the prima facie presumption to be drawn from the fact that the Regulations laid down by Government for the saie use of boilers were not complied with.