
(2008) 08 PAT CK 0091
In the Patna High Court
Case No : CWJC No. 9730 of 2006

Kailash Sharma

APPELLANT

Vs

The Patna Municipal Corpn. and Others

RESPONDENT

Date of Decision : 21-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14

Sales of Goods Act, 1930 — Section 13(2), 32, 42, 59

Citation : AIR 2009 Patna 10 : (2008) 57 BLJR 97 : (2009) 2 PLJR 378

Hon'ble Judges : Navaniti Prasad Singh, J

Bench : Single Bench

Advocate : Dineshwar Mishra and Surendra Mishra, for the Appellant; Ajay Bihari Sinha, for the Respondent

Final Decision : Allowed

Judgement

Navaniti Prasad Singh, J.—Petitioner is the Branch Manager and authorized representative of M/s Post Control (India) Pvt. Limited.

2. Pursuant to notice inviting tender dated 21.4.2005 issued by the Patna Municipal Corporation for supply of Fogging machine/Ultra Low Volume machine, for combating with mosquito menace in the town. Petitioner responded. There were technical discussions, which were held on 9.5.2005. The Technical Committee of the Corporation unanimously approved the purchase of Ultra Low Volume Machine with remote control manufactured in Germany. The Corporation accepted the tender initially for three machines with pending order for four more fogging machines after evaluating the performance of three machines. As per the said order dated 2.7.2005 the total payment of Rs. 17,04,4000/- for the three machines were to be made within one week from the date of supply of machines. It was further ordered that the Company would arrange for installation and training of staff free of cost and the delivery was to be made within one month of the order. The machines had to have a warranty of the Company for a period of one year.

3. After receipt of the order on 13.8.2005, the three machines were duly delivered to the Corporation and acknowledged by them. Bills regarding payments were then submitted and received by the Corporation on 22nd August. 2005. Employees of the Company came and gave practical demonstration, of all the three machines and all the three machines were found satisfactory and were accordingly certified by representative of the Corporation also as would be evident from Annexure 4 the letter of the Company to the Corporation bearing endorsement of the representative of the Corporation. Then starts the problem.

4. On 27th December, 2005, after waiting for i.e. more than three months, for payment, which was due within a week of delivery of the said machines, the Company wrote to the Corporation drawing its attention and repeated requests were made but there was no response.

5. After the writ application was filed, a counter affidavit was filed by the Corporation on 25.6.2008 sworn by Additional Commissioner, Patna Municipal Corporation. In the said counter affidavit the only reason given is that the fogging machines supplied by the petitioner have not been found fit for the purpose of killing the mosquitoes, as has been reported by the Assistant Health Officer and they have recommended for return of those logging machines and as such payment has not been made.

6. Better particulars were required by this Court for justifying the action from the respondent- Corporation and as such a fresh counter affidavit was filed on 20.8.2008. To the said counter affidavit Annexure A is the letter of the Assistant Health Officer, Bankipur Anchal, dated 7.3.2006. This is Annexure A to the counter affidavit and really disclosed the reason for non payment. In the letter it is admitted that the machines having been received, it were used in different areas and were not found effective enough to kill the mosquitoes. It was opined that probably machines were fit for crop spraying but not for urban uses. It may also to be noted that this is the first communication of this nature being made after six months of having received the machines and used it, then in Annexure B, by the Assistant Health Officer, New Patna Circle, here, the only problem, pointed out by him is that during its use a pressure cap of the machine was blown out and as such he thought that machines have some defects and should be returned. This communication is also of 9th March, 2006. This is followed by communication of the Chief Engineer dated 1.6.2006 (Annexure-C to the counter affidavit) where again the only thing that is said is that during working in one of the machines, pressure cup was blown away, which should be replaced and the Corporation was contemplating of returning the machines. This communication is nine months utter receiving and using the machines.

7. At the bar it is stated that whenever necessary, machines are even today being used. It is thus, submitted that the Corporation has for public purpose out of public fund sought to purchase the machines after satisfying itself of the technical requirements. Machines were ordered. After full demonstration they were accepted on satisfactory performance having done. The respondents were

obliged to make payment, as agreed by themselves, within one week of delivery but the payments are now being with-held on the ground that the Corporation is contemplating of returning the machines though till date no formal communication has been made though machines were supplied in August, 2005 and we arc in August, 2008. It is thus submitted that the action of the respondents in with-holding the payment is nothing but n pretence of an excuse, which is not sustainable in law. It is further submitted that the respondents are functioning in public law domain and even otherwise arc required to act in accordance with Article 14 of the Constitution. The action being per se arbitrary and unreasonable, they are liable to be directed to abide by the terms of the contract and consequently make payment as promised, for, State must do what is just and fair and not raise technical objection to defeat the legitimate claims of the petitioner.

8. Heard learned Counsel for the parties and with their consent this writ application is being disposed of at the stage of admission itself.

9. In my view, the facts are sufficiently enough to establish a contract and supplies pursuant to the contract, which was duly accepted. Once supply was accepted then it does not lie with the Corporation to repudiate the transaction and return the goods even if something goes wrong when it is duly covered by warranty stipulation. Here I may point out that the very act of having received the machines, seen the demonstration, used it and retained for a such long time is a valid acceptance within the meaning of Section 42 of the Sale of Goods Act, 1930. Here I must refer to Section 32 of the Sale of Goods Act, 1930 first.

32. Payment and delivery are concurrent condition.-

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

10. In the present it would be seen that the law provides that payment and delivery are concurrent but that is subject to an agreement otherwise. Here the agreement was for payment within one week of delivery. What lo talk of one week, almost three years have gone bye, therefore, the first breach is by the State itself.

11. Now one may refer to the alleged blowing up of a pressure cap. This does not by any stretch of imagination show any defect in the machine. Pressure caps are generally safety device.

12. Learned Counsel for the petitioner submits that this is not covered by warranty and if the Corporation wants replacement thereof, they were required to pay but could not under threat of repudiating the transaction same itself fore the company to supply the same free of cost. In this connection one may usefully

refer to Section 13(2) of the Sale of Goods Act, 1930, which clearly states that where there is a warranty then at best the purchaser can raise a claim for damage but can not repudiate the transaction itself as is being sought to be done by the Corporation. This section has been read with Section 59 of the Act. Relevant parts of Sections 13(2) and 59 are quoted hereunder:

Section 13(2)- Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

59. Remedy for breach of warranty.- (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may-

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty.

13. Thus even if it were a case of breach of warranty, which is pleaded against, the Corporation could not repudiate the sale transaction itself.

14. Thus, on all counts the Corporation is at fault in law in not making the payment. The stand of the Corporation is clearly arbitrary and is not sustainable in law. The facts do not support the respondents. They are all pretence of an excuse to with-hold payment. Therefore, I have no hesitation in directing that the Corporation is bound by the agreement propounded by themselves and bound by the terms thereof. It was thus bound to make payment within one week in the month of August, 2005 itself and not having done so, they have failed to abide by the terms of agreement set up by themselves. They are thus liable to be directed to abide by the terms and consequently to make due payment forthwith. If payments are made within a period of one month from the date of production of a copy of this order before the Municipal Commissioner, Patna, then the petitioner would give full due discharge in that regard but in case payments are not made within one month then payments would be liable to be made along with interest at the rate of 12% per annum from the date payments are due till the payments are made.

With the above observation and direction, this writ petition stands allowed.