(1974) 06 CAL CK 0021

In the Calcutta High Court

Case No : F.A. No. 391 of 1961

Krishna Marble and General Stores APPELLANT

Vs

Air Assam RESPONDENT

Date of Decision : 11-06-1974

Acts Referred:
Sales of Goods Act, 1930 — Section 21, 24

Citation : 78 CWN 910

Hon'ble Judges : P.K. Chanda, J;A.K. Sinha, J

Bench : Division Bench

Advocate : Abinash Ch. Bose, for the Appellant;B.L. Jain and Amiya Narayan Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sinha, J.—This appeal is by the defendant against a/money decree passed by the trial court briefly in the following circumstances The plaintiff-respondent filed a suit for recovery of a sum of Rs. 7,057.25 nP on account of charges for carrying certain goods by steamer to a place known as Tinsukia in Assam and for demurrage for not clearing the goods lying in the godown of the plaintiff after they reached the destination on 16.11.57.

2. The defendant, the present appellant, contested the suit mainly on the ground that one M/s. Govindaram Trilokchand were the consignors and consignees of the goods and so they were not liable for the amount as claimed. The defendant sold the goods to them but some time later it was reported that the freight receipt was lost whereupon the defendant asked the plaintiff to issue a duplicate receipt in the name of M/s. Govindaram Trilokchand as consignors and consignees, but the plaintiff neglected and failed to do so. Accordingly, the plaintiff denied categorically the entire liability to pay the amount as claimed by the plaintiff.

3. The learned trial Court upon the evidence adduced took the view that it was the defendant-appellant and not M/s. Govinldaram Trilokchand which was both

the consignor and consignee of the goods and as such it was liable for the whole amount on account of freight and demurrage and accordingly passed a decree for the entire amount in favour of the plaintiff. That is how, in short, the appellant felt aggrieved and preferred the present appeal.

4. In the appeal before us identical questions arise for decision. The main question for fixing the liability on the defendant is whether or not it was the consignor and the consignee in respect of the disputed goods made over to the plaintiff for carriage by steamer to the place of destination. Mr. Bose on behalf of the appellant has contended that on the evidence adduced it would be clear that the defendant sold the property to one M/s. Govindaram Trilokchand and it was that firm which actually delivered the goods to the plaintiff for carriage by steamer to the place of destination. It is said that the defendant had nothing to do with the goods and as such it could not be held liable for any portion of the amount either on account of freight or demurrage as claimed by the plaintiff. It appears that the question whether at the date of making over the goods to the plaintiff the defendant was the owner of the goods and obtained the freight receipt in its name both as consignor and consignee is preeminently a question of fact. The plaintiff in order to establish its claim has adduced evidence of two witnesses named one Sugan Chand Sarawgy, who described himself as the partner of the firm and one Phanindra Nath Dutta who was an employee of the plaintiff firm from 1950. The defendant adduced evidence at two witnesses named Narsingdas Jhanvi, who described himself as the owner of a firm known as ''Narsingh & Sons'' and another witness named Mohanlal Bajaj, who described himself as the cashier of the firm Gobindaram and Trilokchand; besides oral evidence, documentary evidence was adduced on behalf of both parties. The learned trial Court has carefully analysed the evidence of these witnesses and also documentary evidence of this case and after consideration of such evidence, oral and documentary, held that it was "the defendant who was the consignor and consignee combined". The defendant''s case that the disputed goods were purchased by it from the firm named ''Narsingdas & Sons'' and thereafter it sold the same goods to the firm M/s. Govindaram Trilokchand was disbelieved and the court held in substance that it was the defendant who was the owner and made over the goods to the plaintiff for carriage by steamer to the place of destination on agreeing to pay the freight charges and also the charges on account of demurrage in terms of the stipulation contained in the agreement on the reverse of the consignment notes.

5. We have been taken through both oral and documentary evidence at length by Mr. Bose, learned Advocate for the appellant. On a careful study of the evidence it seems difficult for us to take a view different from that of the trial Court. Mr. Bose has, however, contended that there is no evidence in this case in proof of the fact that the defendant made over the goods to the plaintiff as owner for the evidence on behalf of the plaintiff is that the order for booking of the goods was received by a telephonic message. It is contended that such a message over the telephone cannot establish conclusively that the goods were booked on telephone

by the defendant company. In support of such contention Mr. Bose has relied on a passage in Sarkar''s Evidence Act, 12th Edition, page 595 and tried to impress upon us that in the facts and circumstances of this case the message over the telephone should be disbelieved. If that be so, it is contended, in absence of production of register by the plaintiff for receiving booking orders the plaintiff''s case that the goods were booked and delivered by the defendant for carriage remained entirely unestablished. We are unable to accept this contention as correct; firstly because, the consignment notes admittedly appear in the name of the defendant both as consignor and the consignee. Secondly, even on the defendant''s own showing it merely asked for issuing a duplicate copy in the name of another firm M/s. Govindaram Trilokchand without pointing out that it was M/s. Govindaram Trilokchand who was the owner of the goods and who actually booked the goods as such owner for carriage to the place of destination. The relevant letter in this connection merely asking the plaintiff to issue a duplicate incorporating the name of Govindram Trilokchand in the facts and circumstances of this case, seems to be clearly an afterthrought. Secondly because, in our opinion the title to the goods in dispute at the material; time did not pass to Govindaram Trilokchand for it seems clear that the payment of sale price, even assuming such payment was genuine one, was made by a cheque dated 12.11.57 (Ext. E) whereas the goods were booked for carrage under consignment note No. 6690 dated 16.10.57. Mr. Bose, however, has relied on several sections under the Indian Sale of Goods Act, namely, sections 21-24 and contended that since the disputed goods, as it is in evidence, were directed to be delivered by the defendant to the jetty Sarkar of M/s Govindaram Trilokchand at the material time the property in the goods must be deemed to have passed to the buyer. We do not think that any of the provisions relied on by Mr. Bose of the Indian Sale of Goods Act has any application to the facts of the present case. Really these are all questions of fact and no issues were framed and the learned trial Court did decide this aspect of the matter at all. But even assuming that Section 24 does apply then also in order to complete the sale and title to the goods the requirements of clauses (a) and (b) of Section 24 must be fulfilled. In this case, there is no evidence when, after the goods were delivered, the approval or acceptance was signified to the seller or that buyer did any other act adopting the transaction. Nevertheless, if we accept the date of payment as the date when the conditions in clause (a) would be deemed to have been fulfilled then, clearly, the property in the goods can at best be deemed to have passed at a much later date and not on the date when the goods were made over to the plaintiff for carriage by steamer to the place of destination. Further, it is clear from the evidence that the consignment note was made in the name of the defendant. It is difficult to see why after the property in the goods had already passed to M/s. Govindaram Trilokchand these consignment notes were allowed to stand in the name of the defendant. Still further it appears from the defendant''s own letter dated 18.8.58 in reply to the letter addressed by the Advocate on behalf of the plaintiff that the only case made out was that the duplicate copy of the consignment note was not given and the consignment remained undelivered in the godown of his client and all efforts of the defendant to obtain delivery of the consignment proved futile in absence of the original document. It is stated that one of the defendant''s representatives at the destination examined the contents of the consignment and discovered that due to careless handling and storing the goods deteriorated in quality. It is then stated that the plaintiff was shifting the blame for non-delivery on the defendant and the defendant would hold the plaintiff liable for costs of goods ''as per reasons explained''. From these statements there can be little doubt that the defendant was asserting its right as owner of goods and it insisted on holding the plaintiff liable for the non-delivery of the goods. We therefore, find no substance in the contention raised by Mr. Bose. Accordingly, we agree with the finding of the trial court that at the maternal time the defendant-appellant was the owner of the goods and it booked the goods as consignor and consignee with the plaintiff for carriage by Steamer to the place of destination in accordance with the terms of contract embodied in the consignment notes.

6. This brings us to the question of charges on account of freight and demurrage. The trial Court as already noticed passed a decree for the whole amount without examining the correctness of the plaintiff''s claim or whether the amount claimed was excessive or illegal. In our opinion, this was not a proper approach to the question. There is no dispute in this case about the amount chargeable as freight. But the question with regard to demurrage is not free from complexity. It is of course not disputed that the rate of charges on account of demurrage was not correct but the question still remains as to whether the plaintiff is entitled to such demurrage for the period upto date of the institution of the suit. In the facts and circumstances of this case, we think, after expiry of sixty days in accordance with the terms of the contract embodied in the consignment note the plaintiff should have taken recourse to the alternative remedy of selling the goods as the delivery thereof was not taken by the defendant. It is, however, stated on behalf of the plaintiff company that it did not find any buyer but the evidence adduced was merely hearsay. No witness from the place where the goods were lying has been examined and no papers even have been produced to satisfy the court that any bona fide attempt had been made to sell the goods. Granting that the plaintiff was not bound under the terms of the contract to put the property to sale there seems to be no justification for the plaintiff to wait for such a long time only by taking recourse to useless correspondence. Mr. Bose has relied on a decision of the Judicial Committee as also decisions of several High Courts to show that all efforts should be made by the parties to minimise the damages. (See Dhanu Lal Vs. Kuldip Narayan Singh and Others, Pannalal Jugatmal Vs. State of Madhya Pradesh, Arjun Das Nariram Agarwalla Firm Vs. The Secretary of State, and Arjun Das Nariram Agarwalla Firm v. The Secretary of State). The learned Advocate for the respondent however has relied on a decision of the Supreme Court reported in (Raichand Amulakh Shah Vs. Union of India (UOI), as also one of Allahabad High Court reported in 1 (Puttu Lal Vs. General Manager, N.E. Railway, Gorakhpur and Another,) and contended that the

question in the instant case is not one of damages but of demurrage which obviously means charges payable to the plaintiff for the defendant''s failure to take delivery of the goods lying at its godown at the destination. It is not necessary for the purpose of this case to discuss in details the question actually decided in the above cases. Even assuming that the respondent was entitled to get demurrage and not damages it had the remedy to sell the goods after expiry of sixty days. In such circumstances on the facts of this case we do not see any reason why principle as to assessment of damages cannot apply although it may be that Section 73 may not be applicable. It would be unfair and improper for a court of law to allow the plaintiff to go on increasing the demurrage even though it had remedy to minimise such charges on this head by disposing of the property under the contract. The plaintiff gave a final notice on 22.5.58 for disposing of the consignment at the minimum available price at the risk and responsibility of the defendant to realise dues, Why-even thereafter the plaintiff again sent letters through its Advocate demanding payment of fill charges including demurrage by a letter dated 28.7.58 ? In the facts and circumstances of this case giving maximum concession we do not think that the plaintiff is entitled to get demurrage beyond seven days after 28.7.58. In our opinion, therefore, the plaintiff is entitled to get on account of freight a sum of Rs. 1590.25 and demurrage at the stipulated rate of Rs. -/1/- per diem for not taking delivery of the goods upto 5.8.58 amounting to Rs. 3910/-, that is, in all the plaintiff will get a total sum of Rs. 5500.25. Even so, at the same time the plaintiff-respondent being in the position of a bailee was obliged to return the goods against payment of freight and demurrage. The plaintiff''s own case is that it was ready and willing to return the goods as and when the defendant will ask for it. Since the defendant did not move in the matter after filing the suit it was clearly obligatory upon the plaintiff to place the goods at the disposal of the court or to give sufficient proof as to the condition of the goods at least at the date of the trial and to show its preparedness to produce the goods on obtaining a suitable direction from the court. This has not been done and that at this distance of time it seems quite reasonable to suppose that the plaintiff would not be able to return the goods which it may fairly be presumed must have been lost or destroyed. Even the learned Advocate on behalf of the plaintiff-respondent could not enlighten us either as to condition of the goods or the whereabouts of the good''s. Considering the matter from this aspect, we think, it would be useless to send the case back on remand for ascertaining the conditions or whereabouts of the goods and also whether the plaintiff would be in a position to deliver the goods against the payment of such sum as claimed or as may be decreed. It would be, therefor, just and proper to deduct the value of the goods from the total amount which we have found the plaintiff to be entitled to. The defendant has produced a cheque for a sum of Rs. 1139.25 P. showing payment by Govindaram Trilokchand (Ext. E) as price of the goods. The payment of this mm by cheque, it appears, has not been disputed by the plaintiff. But considering the fact that the defendant failed to take delivery of the goods within a reasonable time that value of the goods as evidenced by the cheque in its entirety cannot be deducted. Therefore considering the reduction of value owing to the deterioration of goods due to lapse of time we would be justified in deducting a sum of Rs. 800/- from the total amount which the plaintiff has been found to be entitled to get.

Accordingly, this appeal is allowed in part. We modify the decree of the trial Court to this extent that instead of Rs. 7052. 28 nP there shall be a decree for Rs. 4,700.25 in favour of the plaintiff with proportionate costs in the suit, but we make no orders as to costs in this appeal.

Chanda, J.

I agree.

