**(1995) 04 AHC CK 0026**

**In the Allahabad High Court**

**Case No :** Civil Misc. Writ Petition No. 3339 of 1979

M/s. Digamber Pershad Kirti Prasad APPELLANT

Vs

State of Uttar Pradesh and others RESPONDENT

**Date of Decision :** 13-04-1995

**Acts Referred:**

Contract Act, 1872 — Section 7
Forest Act, 1927 — Section 83(1)
Sales of Goods Act, 1930 — Section 20, 26, 4(3), 4(4)

**Citation :** AIR 1996 All 1

**Hon'ble Judges :** R.R.K. Trivedi, J;Om Prakash, J

**Bench :** Division Bench

**Advocate :** Ashok Khare and Shashi Nandan, for the Appellant; Standing Counsel, for the Respondent

**Final Decision :** Dismissed

## Judgement

Om Prakash, J.—The short question for consideration in this writ petition is whether or not the petitioner is liable to pay purchase price demanded from it by impugned notice dated 28-4-1979 (Annexure "4" to the writ petition).

2. Facts are that the petitioner made a highest bid of Rs. 2,70,500/- on 27-8-1976 for lot No. 18/76-77 West Pinder Range, Compartment, No. 8, Pherkot, Badrinath Forest Division, which was accepted. On the same day the petitioner deposited security to the tune of Rs. 27,100/- equal to 10% (ten per cent) of the auction price with respondent No. 3. An agreement to sell was executed on 27-8-1976 between the petitioner and respondent No. 3 subject to terms and conditions, which are in a brochure filed at the time of hearing of the petition and which has been relied on by both the parties. The said auction was approved by the Conservator of Forest, Garhwal Circle, Pauri, within the stipulated time and that was duly communicated to the petitioner by respondent No. 3 by letter dated 14-9-1976. After approval of the auction, the petitioner deposited additional security in the sum of Rs. 35.165/- i.e. 13% of the purchase

 

price, to be adjusted towards sales tax when it became payable.

3. The petitioner was required to complete the work under the contract in the forest by 31-12-1977 and it commenced the work of felling trees on 16-1-1977. All the trees were felled, sawn and timber was collected at a central point for aerial transportations. It is averred in paragraph 7 of the writ petition that the petitioner had taken all possible precaution to prevent the timber from being destroyed by fire, for which purpose inflammable material was removed up to 1 (sic) feet around the collection point and that watchmen for keeping vigil throughout day night and were employed.

4. On 3-4-1977 fire broke out, which destroyed the timber of lot No. 18/76-77, The respondents, however, served on the petitioner the impugned demand notice dated 28-4-1979 (Annexure 4 to the writ petition) calling upon it to deposit Rs. 2,70,500/- with the Government treasury before 15-5-1979, failing which recovery proceedings as arrears of land revenue were threatened.

5. In paragraph 24 of the petition it is pleaded that title of the timber auctioned on 27-8-1976 vested in the State Government until full payment was made and an export permit was issued to remove the timber through the check post. It is averred that the stage of removing the timber did not reach, inasmuch as the entire timber was destroyed by fire. In paragraph 25 of the writ petition it is further pleaded that there was no completed sale and only an agreement to sell took place between the parties, inasmuch as the title in the goods remained vested in the State Government. In paragraph 27 of the writ petition, it is averred that before the sale was completed, the subject-matter of the contract was destroyed by fire and, therefore, the contract stood frustrated, inasmuch as performance thereof had become impossible. The contract having become frustrated, the petitioner pleaded in paragraph 28 of the writ petition that it was not liable to pay any amount offered at the time of auction; rather it is entitled to get refund of the security and additional security have been deposited at the time of auction.

6. In paragraph 25 of the counter-affidavit filed on behalf of the respondents it is pleaded that the sale of the lot in question was completed the moment it was approved by the Conservator of Forest, which was admittedly, approved within the stipulated time and the petitioner commenced work of felling trees on 16-1-1977 when the possession of the area was delivered to the petitioner. It is, therefore, pleaded that a concluded contract came into being immediately after the approval was communicated by the Conservator of Forest and that, as the fire broke out much after the contract was concluded, the petitioner was liable to pay the purchase price under the contract.

7. It is averred in paragraph 38 of the counter-affidavit that at the time of auction all the condition of sale as contained in the brochure were duly read over and the agreement was subject to those conditions. It is pleaded that from the said conditions it clearly appears that the property and the risk in the goods both

 

passed to the petitioner and hence it became liable to pay the purchase price under the concluded contract, notwithstanding the fire, which broke out after the petitioner felled the trees, sawn and collected the timber at the point from where that was to be transported.

8. The submission of Sri Khare, learned Counsel for the petitioner, is that under subsection (4) of Section 4 of the Sale of Goods Act 1930 (referred to hereinafter as ''the Act'') an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. He drew our attention to condition No. 33 of the brochure relating to the year 1976-77 which in so far as relevant states that the property in the goods will not pass to the buyer until the timber is taken out from the check post and all the conditions of contract including the condition of full payment having been made are fulfilled. In short, his argument is that the petitioner only felled the trees, sawn and collected the timber at the central point and before the full payment was made and timber was removed from the check post, fire broke out, and, thus, on account of non-fulfillment of condition No. 33, the property in the goods did not pass to the petitioner and the fire having broken out before passing the property in the goods the contract was frustrated. The contract being frustrated, argues Sri Khare, the petitioner is not liable to pay the purchase price under the contract.

9. We do not see any force in the submission of Sri Khare.

10. The auction was made on 27-8-1976 and on the same date an agreement to sell was signed by the petitioner with respondent No. 3. The said auction was approved by the competent authority i.e. the Conservator of Forest, respondent No. 2, within 46 days as per the agreement, and then the petitioner took control and possession of the trees, which it felled under the agreement. Then the timber was sawn and collected at the central point which was in a deliverable state. The agreement to sell became concluded contract immediately after the auction was approved by the competent authority and the petitioner started felling trees after having taken control and possession of the trees. The petitioner made an offer to purchase timber after felling the trees and that offer was finally accepted by respondent No. 2 who was a competent authority in that behalf. Upon his acceptance, the agreement to sell became a concluded contract. The contract was not subjected to any condition to be fulfilled in future. The contract of sale of timber was absolute and not conditional.

11. Under the sub-section (3) of Section 4 of the Act when property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or upon fulfillment of some conditions or subject to some condition (s) thereafter to be fulfilled, the contract is called an agreement to sell. It means that an agreement to sell becomes a contract of sale when property is passed. The submission of Sri Khare is that the property in the goods did not pass to the petitioner, inasmuch as the timber was not removed from the check post and as the condition No. 33

 

of having made full payment was not fulfilled. The question is whether the agreement was subjected to the condition of the payment having been made? In our view, the agreement was not subjected to any future condition of the full payment having been made, but agreement became a concluded contract when the auction was accepted by the competent authority i.e. respondent No. 2, possession of the trees to be felled by the petitioner was given and when the petitioner started felling the trees. Our view is fully fortified by the decision: Badri Prasad Vs. State of Madhya Pradesh and Another, , in which respondent No. 2 in that case purchased at an auction sale held on 24-12-1956 the cut timber and arcat trees of specified area of a forest. The purchase price was payable in four installments. The first one was payable at once. A formal deed of contract signed by respondent No. 2 and the Divisional Forest Officer was sent to the Chief Conservator of Forest who signed it on 3-5-1957. According to the terms of the contract, the contractor, respondent No. 2, was to commence his work of collecting and removing the cut timber within one month. The contractor took possession of the standing/felled/collected material. There was default in payment of the second installment, which was due on March 1,1957. Fire broke out in the forest and the timber sold to the contractor was burnt. The contractor did not pay second, third and fourth installment. He was prohibited to remove the timber due to non-payment and was called upon to pay the unpaid installments. A suit for declaration of his non-liability to pay the amount of installments was filed by the surety of the contractor. On these facts, the Supreme Court held, that the contract was unconditional, the goods sold were specific, they were in a deliverable state and, therefore, the property in the goods did pass at the time when the contract was made. Such a view was taken by the Supreme Court keeping in view of the provisions of Section 20 of the Act. Referring to Section 20, the Supreme Court held that this section would have applied even if the time of payment of price had been postponed.

12. From the dictum of the Supreme Court, it clearly appears that Section 20 of the Act would apply even if the payment of price was postponed. Section 20 states that where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the time of delivery of goods or both is postponed. To apply Section 20 two things are to be proved: (i) that the contract is unconditional; (ii) that the goods are ascertained in a deliverable state. If these two things exist, then the property in the goods will stand to have transferred when the contract is made.

13. In Badri Prasad v. State of Madhya Pradesh, AIR 1970 SC 706 it was held that when the trees contracted to be severed are ascertained and identified, they became ascertained goods and that the property will pass to the purchaser when the trees are felled.

14. In the case at hand, the trees contracted to be severed were not only ascertained and duly identified, but they were actually felled and timber was

 

sawn and collected at the central point by the petitioner and, therefore, the timber when it was sawn and collected at the central point was in a deliverable state within the meaning of Section 20 of the Act and. contract not being conditional one, both the ingredients of Section 20 existed and the property in the goods can be held to have passed right at the stage when the petitioner took possession of the trees and felled them and when the timber was sawn and collected at the central point, from where that was to be transported through the check post upon full payment having been made. Simply because full payment was not made and the timber was not actually removed, it cannot be said that the property in the goods was not transferred to the petitioner. Transfer of property in the goods depends on the facts and circumstances and intention of the parties to the contract. There is nothing to indicate that the parties intended otherwise that the property will not pass in the goods even when the petitioner felled the trees and the timber was sawn and collected after having taken control and possession of the trees and the timber.

15. Then comes Section 26 of the Act, which states that unless otherwise agreed, the goods remain at the seller''s risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer., the goods are at the buyer''s risk whether delivery has been made or not. Law, therefore, is that the risk remain with the seller until the property in the goods is transferred to the buyer. But this rule is subject to the agreement made between the parties. It means that the parties are free to make an agreement contrary to this rule, meaning thereby the parties can agree that risk will pass to the buyer even before the property in the goods is transferred from seller to the buyer. In this connection, condition No. 21 of the brochure is significant and worth citing. Condition No. 21 clearly states that after 30 days from the date of acceptance of the contract or from the date of commencement of work under the contract, whichever is earlier, the buyer will be fully responsible for the damage caused to the goods. Condition No. 21 is an agreement between the parties, which runs contrary to the legal position flowing from Section 26 that ordinarily risk will remain with the seller until the property in the goods is transferred to the buyer. Even if for argument sake it is accepted that the property in the goods did not pass to the petitioner, as urged by Sri Khare, it is well established from the acceptance of condition No. 21 of the brochure, that the risk was with the petitioner after the expiry of 30 days from the date of acceptance or from the date of commencement of the work under the contract in the forest, whichever is earlier.

16. In this case, operation of felling of trees commenced on 16-1-1977 and the fire broke out on 3-4-1977 on which date risk was with the petitioner in view of condition No. 21, read with the opening words viz., "unless otherwise agreed", occurring in Section 26 of the Act.

17. Sri Khare to take advantage of the rule of frustration of the contract vehemently relied on condition No. 33(c) which states that the buyer will not

 

become the owner of the goods until the goods are taken out through the check post and full payment as per contract is made. Full payment and delivery of goods are not the pre-requisite conditions of the property in the goods having been passed. It will be seen from Section 20 that the property in the goods passes to the buyer when the contract is made, if the contract is unconditional for the sale of specific goods in a deliverable state. To pass property in the goods actual delivery is not necessary, but if the goods are ascertained and in deliverable state, then the property will pass in the goods immediately upon the contract having been made, notwithstanding the time of payment of the price or the time of delivery of goods, or both, having been postponed. Then the question is how a right under condition No. 33 to stop the movements of the goods is retained by the seller, if full payment is not made. Sub-section (1) of Section 83 of the Indian Forest Act, 1927 is relevant. Sub-section (I) of Section 83 of the Indian Forest Act, 1927 entitles the Forest Officer to take possession of the forest produce when any money payable to the seller has not been paid. It is in view of this provision, which creates a first charge on the forest produce when full amount is not paid by the buyer, condition No. 33 entitles the Forest Authority to stop movement of the goods and that is not determinative of the question whether or not the property in the goods has passed. Similar view was taken in Badri Prasad v. State of Madhya Pradesh, AIR 1966 SC 58 (supra) in which it was held that provisions of Section 83 of the Forest Act creates a lien on forest produce for the money payable to Government and that the action which the Divisional Forest Officer can take for stopping the removal of the forest produce sold is in pursuance of the statutory authority conferred upon him and not in pursuance of any terms of the contract between the parties. Simply because in condition No. 33 it is stated that ownership will pass only when the goods are taken out through the check post and full payment is made under the contract, it cannot be successfully argued by Sri Khare that the property in the goods did not stand transferred to the petitioner even after the bid was accepted by the competent authority, the petitioner felled the trees and the timber was sawn and collected. In view of condition No. 21 as both parties agreed that risk would pass to the buyer upon commencement of the work by the buyer in the forest, the property in the goods stood transferred right at the stage of the twin conditions of condition No. 21 having been fulfilled, which stood fulfilled in the instant case much before the fire broke out.

18. We are, therefore, of the considered view that the contract having been concluded between the parties right at the stage when the bid was accepted by the competent authority and the petitioner commenced the work in the forest and by virtue of the agreement risk having been passed to the buyer immediately upon the commencement of the work, the fire was in realm of possibilities and, therefore, it is not open to the petitioner to plead the doctrine of frustration of contract.

19. For the reasons, the petition fails and is dismissed. The interim order dated 10th July, 1979 is, therefore, vacated.

 

20. Petition dismissed.

 