
(1935) 02 BOM CK 0007
In the Bombay High Court

Nune Sivayya

APPELLANT

Vs

Maddu Ranganayakulu

RESPONDENT

Date of Decision : 12-02-1935

Acts Referred:

Contract Act, 1872 — Section 93

Citation : (1935) 37 BOMLR 538

Hon'ble Judges : Thankerton, J;Shadi Lal, J;Alness, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Thankerton, J.—The facts appear sufficiently from the judgment of the Board. Dunne K. C. and Subba Rao, for the appellants. Upjohn K. C. and Narasimkam, for the respondents. Lord Thankerton. This is a consolidated appeal from a judgment and two decrees of the High Court of Judicature at Madras, dated September 22, 1927, which affirmed a judgment and two decrees of the Court of the Subordinate Judge, Bapatla, dated March 31, 1923, and made in original suits Nos. 86 of 1919 and 83 of 1922.

2. In original suit No. 86 of 1919, the appellants sue the respondent No. 1, in appeal No. 64 of 1930, and his minor son, to whom he is guardian ad litem, respondent No. 2 in said appeal, for damages for breach of contract in respect of five contracts of sale of bales of yarn made between August 10 and 19, 1918, and this suit has been dismissed by the Courts below." In original suit No. 83 of 1922 the respondent No. 1 in the above appeal sues the appellants for an amount due in respect of goods supplied, and this suit, out of which the second appeal arises, has been decreed in the respondent's favour, the only defence of the appellants having been that the amount so due has been taken into account in their claim against the respondent in suit No. 86 of 1919.

3. The five contracts (exhibits A, B, C, D, and E) were for the purchase of 155 bales of yarn in all, the respective quantities and description being as follows :-

- A.-Ten Gaigoda yarn bales and five Raipur yarn bales,
- B.-Forty-five Tinnevely yarn bales
- C-Sixteen Astodia yarn bales,
- D.-Forty-five Goka yarn bales and ten Jemsetjee yarn bales, and
- E.-Twenty-four Broach yarn bales.

4. Up to October 11, 1918, delivery had been made and accepted of five Gaigoda bales under contract A, thirty Tinnevely bales under B, and seven Broach bales under E. No question arises as to the ten Jemsetjee bales under D, and they need not be further referred to. It may be taken, as the admitted result of the findings of the Courts below, that no further delivery was offered or asked for until December 19, 1918. The respondents had not paid in full for the bales already delivered, and respondent No. 1 admits that he was indebted to the appellants for over Rs. 26,000 by the end of October. This indebtedness, however, was subsequently discharged by him. It may be added that a serious fall in prices began in the month of September, with, further gradual falls in the next three months.

5. On December 19, 1918, the appellants sent a lawyer's letter to the respondents on the following terms :-

You have struck a bargain with the people of Chjrala Dukanam (shop) pertaining to our clients, Nune Ranganayakulu Garu and Panakalu Garu, agreeing to take delivery from time to time of 160 bales of different sorts of yarn according to different rates and to pay the amount forthwith. Out of that you have taken delivery from time to time of 54 bales and paid some amount. Still there is due" about Rs. 24,000 and interest in respect thereof, Out of the bales to be delivered. . to you, 5 bales of No. 40 Gayigoda yarn and 5 bales of No. 40 Rayapur yarn, in all 10 bales are ready at Chirala and 45 bales of No. 26 Goka yarn at Guntur.

You are hereby informed that you should within 31-12-18 pay money and take delivery of the 10 bales of Gayigoda and Rayapur yarn, that you should take delivery of No. 26 Goka bales at; Guntur if you so please, that if you do not agree to the same and want the goods to be sent to Chirala alone, our clients are ready to despatch them, that you should, by return post, inform our clients about your opinion as regards this, that intimation would be given as soon as the other goods are ready, that, if you fail to take delivery of the goods that are ready, you would be liable to the: entire loss caused to our clients, that you should forthwith pay also the principal and interest due by you to our clients as per khata in respect of goods previously taken delivery of and that, otherwise, a suit would be instituted.

6. To this the respondents sent a reply, also drawn by a lawyer, and dated-January 3, 1919, in the following terms :-

Notice issued by M.R.Ry. Govindurajulu Venkata Srinivasa Rao, High Court Vakil, Madras, on behalf of Maddu Rangnayakulu Garu, to M.R.Ry. Yeka Lakshmi Narasimham Pantulu Garu.

7. My client gave me the notice dated 19-12-18 sent to him by you on behalf of Nune Ranganayakulu Garu and do. Panakalu Garu residents of Guntur, with instructions to give a reply thereto with the matters herein below. I have, therefore, to-, inform you as follows :-

According to the arrangements effected between your clients and my client, your clients are bound to deliver all the goods relating to the contracts mentioned in your notice, within two months from the dates of the respective contracts. When you have-failed to do so my client is not bound to take delivery of the goods after the expiry of the due date. According to the said terms, my client has taken delivery of all goods delivered by your clients within the due date. My client has no objection whatever to pay the amount ascertained to be due to your clients on looking into-the accounts relating thereto. It is very strange to write, long after the expiry of the due date, that some goods are now ready, that they should be taken delivery of, and that intimation would be given as soon as the remaining goods are got ready. Your client has no right, to ask that the goods should be taken delivery of after such an unreasonable delay. My client is not bound to take delivery either of the goods; alleged to have been made ready now or of the goods that might be made ready hereafter. Only on account of the default of your clients, the contracts relating to" the said goods were not enforced. They have been cancelled. My client is not liable: to pay any damages whatever to your clients. Because your clients were unable to pay the amount due to the mill people, and because your clients were unable to; get goods in time from the mill or to take delivery even of the goods received, not only did you fail to supply goods to my client as per contracts but you also write that some goods are ready because the prices have now fallen very low, devising some plan with the evil intention of obtaining wrongful gain. It is learnt that, even as-regards the goods which your clients have intimated that they are ready, some have not as yet been delivered to your clients. If however it is held for argument"s sake that there is nothing like two months" time all the said contracts are void and are not at all valid in law, Your clients will not have any benefit in the least from such contracts.

Be pleased to consider.

8. The appellants responded on January 23, 1919, as follows :-

The registered letter written on 3-1-1919 by M.R.Ry. Govindarajula Srinivasa Rao Panthulu Garu on your behalf to Nune Panakulu Garu and Ranganayakulu Garu has been sent to us with instructions to reply to the said letter in this manner. No arrangement was ever entered into between you and our clients, as mentioned in your letter, to deliver the goods either within two months of the "date of contract, or within any other time-limit or within any stipulated period. It is also

improbable that it should have been effected in the said manner. While you were unable to : pay the entire amount, took delivery only of some goods mentioned in the contract out of the goods sent by the mill people to our clients and while unable to pay in full the entire amount also due therefor, you stated that our clients are unable to pay the amount, that they could not deliver the goods, that the contract which was in force when the prices were high have now become void in law, that there was time fixed for the delivery of the goods, and that there was unreasonable delay in excess of the time fixed. While our clients were intimating by means of a registered letter that the goods were ready, you entertained doubts even about it and set up false matters bringing into existence imaginary difficulties on account of the present market rate and that we would not at all be benefited thereby. You are hereby informed that, within the end of this month, you should pay the amount due for the 5 bales of No. 40 Gaigoda yarn and for the 5 bales of No. 40 Rayapur yarn, in all, for 10 bales remaining at Chirala with our clients on your account, and the 45 bales of No. 26 Goka remaining in Guntur which are ready, as well as the sum of Rs. 15,500 due to our clients as per previous khata together with the interest thereon and should take delivery of the same; that if you should still entertain the doubt that the goods are not ready, and if you should pay the amount to us, the goods would be arranged to be delivered at our office whenever desired by you ; that, if you fail to do so, the 5 bales of No. 40 Gayigoda yarn and the 5 bales of No. 40 Rayapur yarn, in all, 10 bales remaining at Chirala, will be sold in public auction on 2-2-19 at your risk in Chirala market by M.R.Ry. Kona Venkata Rao Pantulu Garu, Vakil, District Munsif's Court, Bapatala, and the 45 bales of No. 26 Goka yarn will be sold in public auction on 6-2-19 at your risk, at the office of Messrs. R. P. Gill and Co., in Guntur Bazar by M.R.Ry. Kotamraju Venkata Hanumantha Rao Panthulu Garu and that a suit will be instituted without any fresh notice, for the balance sum due to our clients after deducting the net amount realised by the sale after meeting the expenses, and for the amount due on Khata. Be it known further that, as you have informed our clients toy means of the reply dated 5-1-1919 given by you that you do not require the goods remaining in respect of your bargains, my clients are entitled to recover the loss according to the price prevailing in the market on the said date, that you should settle the affair by calculating the amount in the said manner that, if you fail to do so, a suit will be instituted therefore also and that interest at Re. 1 per cent, per mensem will be charged on the said amount of damages from 5-1-1919.

Thereafter the appellants sold the fifty-five bales by public auction, and, on August 14, 1919, they brought the present suit against the respondents for the balance due on the bales sold in auction and for damages in respect of the remaining bales undelivered under contracts B, C and E.

9. The main question is whether the respondents were justified on January 3, 1919, in treating the contracts as cancelled, or whether the appellants were justified, on January 23, 1919, in treating the respondents as having thereby unjustifiably repudiated the contracts. The decision of this question turns on

determination of the exact nature of the contractual obligations as to delivery.

10. The appellants maintained that there being no express stipulations in the written contracts the contracts are governed by Section 93 of the Indian Contract Act (IX of 1872), which provides as follows :-

93. In the absence of any special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery.

11. Although Part VII of the Indian Contract Act, which included this section, has since been repealed by the Sale of Goods Act (III of 1930), the section reappears as Section 35 of the latter Act but with substitution of the words "Apart from any express contract" for the words "In the absence of any special promise." The appellants also maintained that the respondents were not entitled to seek to justify their repudiation of January 3, 1919, except on the two grounds stated in their letter of that date, and, further that, assuming Section 93 did not apply, the respondents were bound, even after the expiry of a reasonable time for delivery by the appellants, to ask the appellants if they would deliver, before they were entitled to treat the contracts as cancelled.

12. The respondents maintained that Section 93 does not apply to the suit contracts, and that, as the Courts below have concurrently found that the reasonable time for delivery under these contracts had expired at latest by the end of November, 1918, they were entitled on January 3, 1919, to treat the contracts, as cancelled. The respondents further maintained that the appellants' offer of the fifty-five bales on December 19, 1918, was not a genuine offer, but this seems to be irrelevant if the respondents were under the obligations of Section 93. They further questioned the genuineness of the auction sales of these fifty-five bales, but that is a minor point which will be considered later.

13. It is necessary to advert to the course of the case in the Courts below.. Before the trial Judge, the appellants do not appear to have founded on section 93, but they led evidence to prove that they had made oral offers of delivery prior to December 19, 1918, and that in November the respondents had come to a settlement of the matter, which they had departed from. The trial Judge held against both these contentions. The respondents, on the other hand, maintained (a) that delivery within two months was a term of the contract, (b) that, failing that, the contracts were void from vagueness and uncertainty, and (c) that, in any event, the appellants were unable to deliver and did not offer to deliver the goods within a reasonable time from the dates of the suit contracts, and that the respondents were therefore justified in rescinding the contracts. The trial Judge held against the respondents on (a) and (b), which were the grounds stated in the respondent's letter of January 3,, 1919, but decided in their favour on (c), holding that reasonable time for delivery had expired at latest by the end of November. On appeal by the appellants, the High Court held that Section 93 did not apply to the suit contracts, and concurred with the decision of the trial Judge. They stated their reason for holding Section 93 to be inapplicable as follows :--

That contention is against the plaintiffs' pleadings in the suit; it is against the evidence of P.W.I, their senior clerk, agent and accountant, as to the custom of their business in respect of such contracts ; it is against the very nature of the contracts-themselves, under which the plaintiffs were to procure from distant parts of India goods, the arrival of- which would be within their knowledge and not within the knowledge of the defendants.

14. It is important to observe that Section 93 applies unless there is a "special promise," which, in their Lordships' opinion, indicates an express stipulation as to delivery which relieves the buyer from the obligation to apply for delivery, or the necessary implication of such a stipulation from the nature of the contract as expressed. It might also arise out of usage or custom of trade, as provided in Section 1 of the Indian Contract Act. But, in their Lordships' opinion, an obligation-assuming that it existed in the present case, as is suggested by the High Court-on the seller to inform the buyer when the goods are in a deliverable state is not a special promise within the meaning of Section 93, though it may postpone the obligation of the buyer to apply for delivery, and, on the elapse of a reasonable time to enable the goods to be procured by the seller from the mills, the buyer would be entitled and bound to apply for delivery.

15. There is no case made or proved of custom or usage of trade, and their Lordships are of opinion that, looking at the evidence as a whole, it is neither proved as a term of the contracts, nor is it a necessary implication from the nature of the contracts, that the buyer was to do nothing until he received an intimation from the seller of the arrival of the goods from the mills. If that be the right view, then there is no special promise, such as would exempt the buyer from his obligation u/s 93. It must be remembered that, when the buyer applies for delivery u/s 93, it will be a question depending on the nature and circumstances of the particular contract as to the time within which the seller is bound to comply with the buyer's demand.

16. Their Lordships are therefore of opinion that the respondents failed to fulfil their obligation u/s 93, and that they were not entitled on January 3, 1919, to treat the contracts as cancelled.

17. In maintaining that the respondents were not entitled to justify their repudiation of January 3, 1919, except on the two grounds then stated, the appellants founded on the case of *Braithwaite v. Foreign Hardwood Company* [1905] 2 K.B. 343, but that case related to the effect of repudiation by a party to a contract as involving waiver of performance by the other party, who was not the repudiating party, of any contractual obligations subsequent to the date of the repudiation, and, in so far as any judicial dicta in that case may be said to go further and are in conflict with the principle as expressed by Lord Sumner in *British and Beningtons, Ltd. v. N.W. Cachar Tea Co.* [1923] A.C. 48, foot, their Lordships are of opinion that they are incorrect, and that the respondents are entitled to justify their repudiation on any ground which existed at the time of the repudiation.

18. The respondents also sought to maintain that, before the date of their repudiation, the appellants had disabled themselves from fulfilling the balance of the contracts, by cancelling their contracts with the mills, or having pledged some bales received from the mills with the bank. But there is no evidence to show that, if the respondents had applied for delivery and at the same time tendered the contract price, as they were bound to do, the appellants would not have been able to satisfy the demand. Such a contention more naturally arises where particular goods have been specifically appropriated to the contract. Their Lordships are also of opinion that the contention of the respondents that the appellants by their conduct had waived or dispensed with the respondents' obligation u/s 93 is not supported by the evidence. It is unnecessary to deal with the contentions of the parties on the assumption that Section 93 does not apply to the suit contracts.

19. The respondents' charge against the bona fides of the sale of the fifty-five bales by auction was based on a finding of the learned trial Judge, The matter was not referred to by the High Court, as it was not necessary for them to consider it. The Trial Judge based his finding that the sale of the whole fifty-five bales was a sham on the admissions of the appellants' first witness, already referred to above. The evidence is that one Chunduri Swami purchased the first lot of two bales of Raipur yarn for Rs. 1,300, that he did not purchase on behalf of the appellants, and that the appellants advanced that sum to Chunduri Swami and debited him with the amount. Their Lordships are unable to agree with the trial Judge that such evidence proves that the sales were a sham. No attempt was made to prove that the appellants had retained the bales. The evidence only related to two bales out of the 55, and the price given for these two bales was only one anna less than was immediately thereafter given for the second lot of three Raipur bales by a purchaser against whom no suggestion has been made ; both lots were the subject of contested bidding.

20. Their Lordships therefore hold that the appellants were entitled to treat the respondents' letter of January 3, 1919, as a wrongful repudiation of the five suit contracts and to rescind the contracts and recover damages from the respondents. It will be necessary to remand both suits for the ascertainment of the damages in original suit No. 86 of 1919, the liability, of the appellants under original suit No. 83 of 1922 being taken into account in arriving at the appropriate decrees in both suits.

21. Accordingly, their Lordships will humbly advise His Majesty that the judgment and two decrees of the High Court dated September 22, 1927, and the judgment and two decrees of the Subordinate Judge dated March 31, 1923, should be set aside and that both suits should be remanded to the High Court as already mentioned. The appellants will have their costs in the consolidated appeal, and in the proceedings in the Courts below prior to this time. The costs of the future proceedings in India will be dealt with by the Court disposing of the case.