

(1930) 01 AHC CK 0037
In the Allahabad High Court

Peare Lal-Kishan Prasad

APPELLANT

Vs

Diwan Singh-Ganeshi Lal

RESPONDENT

Date of Decision : 13-01-1930

Acts Referred:

Companies Act, 1913 — Section 26, 78

Citation : AIR 1930 All 661

Final Decision : Allowed

Judgement

1. Parties to this action are dealers in grain in Mandavi Faizaganj in the city of Meerut. On Jeth Badi 12, Sambat 1982 corresponding to 19th May 1925, the plaintiff-appellant purchased from the defendant-respondent a khatti or grain pit situate in Ahata Sri Ram. The bargain was struck about the purchase of 504 maunds of wheat at the rate of Rs. 5-9-3 per maund. A quarter of the purchase money, Rs. 748-9-6, was paid by way of earnest money. It was a term of the contract that the balance of the purchase money, namely Rs. 2,100,. was to be paid by the plaintiff to the defendant later upto Phagun Sudi 5, 17th February 1926 in accordance with the custom of the trade which prevailed in the Faizganj market.

2. The terms of the contract were reduced to writing and were embodied in two separate documents in printed forms exchanged between the parties. These documents have the curious name of langot. The etymology of the word is not known, but the langot appears to possess the incidents of bought and sold notes. Curiously enough these documents were not produced in the Courts below either by the plaintiff or the defendant; and it was not till a later stage of the progress of arguments in this Court that the "langot" executed by the plaintiff in favour of the defendant was produced in this Court. The parties admitted its genuineness and it was received in evidence.

3. The document is headed with the words "The Meerut Veopar Chamber"" and contains the following entries:

Number of grain pit ... 8 Bank number if the bank's money is invested ... 145

Name of the bank ... Allahabad Bank Name of the person who fills the grain pit ... Diwan Singh Ganeshi Lal Name of the broker ... Mangda Name of Commodity ... Wheat Weight ... 504 maunds New or old goods ... New Full description of the locality where the pit is situate ... Abata Sri Ram Sarak Bhagpat How much money remains due on account of the grain pit ... Rs. 2,100 Date from which interest at 15 annas per cent per month will be charged ... Jeth Badi 12th Sambat 1982 Rent of the grain pit for the next year according to the current year Rs. 35 Signature of the person who fills the grain pit Diwan Singh Ganeshi Lal Date Jeth Badi 12th, 1982, 17th May 1925

4. The document is signed by the Secretary of the Meerut Veopar Chamber. There is a note appended to this document:

The grain pits have been purchased and sold in accordance with the rules of the "Meerut Veopar Chamber." Then follows a tabular form in which the following entries have been recorded:

Date on which grain pit is sold... Jeth Badi 12th, 1982.

Name of seller... Diwan-Singh-Ganeshi Lal. Name of purchaser... Pearey Lal-Kishen Prasad.

Rate... Rs. 5-9-3.

5. The Meerut Veoparak Sabha appears to have commenced its work some time in February 1925. The defendant applied for membership of the Sabha on 21st March 1925. The purchase and sale of the khatti was registered in the books of the Sabha on deposit of one rupee as fee on 16th May 1925. The "langot" embodying the contract was in a printed form prescribed by the Sabha.

6. The Veoparak Sabha was registered u/s 26, Companies Act (Act 6 of 1913) on 16th June 1925. Certain rules regulating the business of the company were framed; but these rules contain a note that

nothing in these rules will apply to transactions prior to the registration of the company.

7. Ex hypothesi, the contract between the parties was made on 19th May 1925, but the company was not registered till 16th June 1925. Some of the rules of this company are material for the purpose of this appeal and may be reproduced.

Rule 2: Before selling the khatti in the market the person who has filled it will get it registered in the chamber, giving a full description thereof regarding locality, weight, serial number of his account book and name of the Bank advancing money on its security with its serial number. When the secretary or the assistant secretary of the chamber has satisfied himself, either personally or otherwise, as to the actual existence of the khatti on the spot, he shall affix the seal of the chamber to the langot agreement of sale, and sign it, whereafter the filler of the khatti will be at liberty to sell the same in the market. Ho shall pay Re 1. as registration fee for each khatti to the chamber.

Rule 6: In case of transactions of grain pits the seller will charge weightment dues at the rate of Re. 1-9-0 per cent, and will allow grain 1% chatak per maund which will be estimated on the actual weight of grain, i.e., grain without dust etc. Purchaser will be responsible for (aal pal) damage, and the filler of the grain pit, for (talron musla) i.e., dampness or rain water.

Rule 9: The following will be the conditions for delivery and quality of goods in respect of different kinds of khattis.

(a) Wheat pits: Every maund containing 30 p.c. of red wheat, 63 p.c. of white wheat, 2 p.c. of dust. 5 p.c. barley, etc.

In case there be more than 5 p.c. of barley etc then half of it will be considered as dust, and half as wheat. A pit containing up to 12 p.c. of other kind of grain, i.e., up to 5 p.c. of barley and 2 p.c. of dust, 5 p.c. of other material will also have to be accepted, but discount at the above rates will be allowed. If the purchaser, on weighing 200 maunds of the goods, finds that the adulteration is in excess of 12 p.c. he may refuse to take delivery of the khatti and accept in lieu thereof, some other pit or may have the same pit weighed by mutual agreement as to discount, etc., with the seller. But once he has exercised his option of accepting the pit, he cannot refuse to take delivery thereof, but he will be entitled to the discount at the above rates. If red wheat is more than 30 p.c. then the purchaser will get ? a pie for each extra percentage of it for every maund, but the whole of the red wheat will not be taken as a khatti of white wheat. A khatti containing 90 per cent of red wheat and 10 per cent of white wheat will be considered as a pit of red wheat. For lesser percentage than 90 per cent discount at rates specified will be charged.

Rule 11: If adulteration is less than what is allowed under the above rules in any pit, then the seller will be entitled to a refund (batta) at the same rate.

Rule 14: The seller will also enter in the langot parcha the condition that if the purchaser, on examining the goods at the time of delivery, refuses to accept the same at the above discount rates, then the seller will deliver to him an equal quantity of new goods. The seller will also enter on the parcha the word "purana mal," i.e., old goods. At the time of the agreement, the earnest money paid to the seller will be paid after deducting the amount due on account of discount and if at the time of delivery these goods are not accepted, and now ones are delivered, then the said amount will be paid to the seller without any interest being charged.

Rule 17: The filler of the pit will be responsible for the damaged goods (talron musla) up to Phagun Sudi 5 of the year in which it is filled up.

Rule 16: The last due date for khatti is Phagun Sudi 5. The purchaser can have his goods weighed whenever he likes till that date. If the buyer does not get them weighed by the last date and does not make the payment on that date, the seller will be entitled to the pit and recover his losses from his contracting party.

8. One of the questions which has to be dealt with in this appeal is whether the rules set out above should be treated as an integral part of the contract between the parties. The Court of first instance answered the question in the affirmative. The lower appellate Court answered it in the negative.

9. In the Memorandum of the Articles of Association, there is a provision that the articles cannot be amended or added to

except after notice of the intention to propose such alteration at some specified general meeting shall have been given at least five days before the date of such meeting.

10. It is also necessary that the alteration shall have been agreed to by a majority of 3/4ths of the members present and voting at the said general meeting. It concludes with the words:

The said modification or addition has to be confirmed at a subsequent general meeting and when this has been confirmed, these articles will be subject to the provision of the Indian Companies Act and will have the same force and effect and be as binding on all members if they had formed part of the original Articles.

11. After the date of the contract between the parties there was an unusually heavy rainfall in the Meerut District which flooded the area where the grain pit was situate. The Meerut Veoparak Sabha, in order to meet this situation, passed a resolution on 8th August 1925 calling on all those persons whose pits were menaced by the effect of the flood to get from the seller some other khatti in substitution or to pay off the price to the purchaser at the chamber's rate of the day. The defendant did not avail of the resolution. One of the questions in the case is as to whether the resolution passed by the Meerut Veoparak Sabha was ultra vires or was binding upon the parties.

12. The custom of trade regulating the purchase and sale of khatti is stated by the plaintiff in the following terms:

In Mandavi Faizganj of city Meerut, the practice regarding the sale of ready khatti is that earnest money, which is about 1/4th of the price, is paid at the time of purchase and the remaining amount is left in deposit with the purchaser and is paid to the original filler at the time of opening the khatti and if the khatti is not opened till Phagun Sudi 5 next the said amount is paid (to the original filler) with interest at the rate of 15-annas per cent per mensem up to the time of opening the khatti i.e., up to Phagun Sudi 5 next, the filler remains liable for tala (i.e., when water comes from beneath) and musla (i.e., when water comes from above) and the person who fills the khatti remains in possession thereof, in lieu of the remaining amount aforesaid.

13. On the date of the contract, the grain pit in dispute was held in mortgage by the Allahabad Bank. There is a recital in the judgment of the trial Court which has not been disputed either in the grounds of appeal of the lower appellate Court or that of this Court that the bank was in possession as mortgagee.

14. The suit which has given rise to the present appeal was instituted on 13th January 1926. The plaint is obscure and not very artistically drawn up. Indeed, it is difficult to understand the nature of the action. It is certain it is not an action for detinue. It is suggestive of a claim for damages for nondelivery of goods to which a complete title had vested in the plaintiff but as a matter of fact, the case has been fought out upon the ground that the title to the property had not passed at the date of the contract. It is not explained upon what basis the plaintiff claims to recover damages. The plaintiff claims from the defendant the difference between Rs. 6 per maund and the rate at which the grain was purchased. Why the plaintiff claims at the rate of Rs. 6 per maund is unexplained. It was essentially a case in which the trial Court ought to have pressed the plaintiff to state his case with a view to clear up the pleadings. Had this been done, much of the obscurity would have disappeared from the case and the issues would have been confined to a very limited area.

15. The plaintiff claimed to recover Rs. 836-3-0 as damages from the defendant on account of the latter's failure to deliver the grain contracted for of a particular kind, quality or description as given in Rule 9 of the rules framed by the Veoparak Sabha. He contended that these rules formed an integral part of the contract, that the defendant had no right to refuse delivery till the balance of the purchase money was paid, that the property in the goods did not pass to the plaintiff at the time of the contract, that the defendant was under a legal obligation to open the grain pit, to weigh the grain and to deliver grain of a marketable quality to the plaintiff, that the plaintiff was not liable for any damage to the goods from the effects of the flood, that the plaintiff was not bound to pay the purchase money to the Allahabad Bank and that the defendant's refusal to deliver the goods to the plaintiff amounted to a breach of contract on his part.

16. The defendant contested the claim on the ground that under the terms of the contract, the property in the goods had passed to the plaintiff, on the date when the contract was concluded, that the plaintiff was liable for the loss or damage to the goods from the action of flood, that the payment of the balance of the purchase money was a condition precedent to delivery, that the plaintiff had refused to pay the balance before delivery could take place, that the defendant was entitled to refuse delivery under the circumstances, and that the breach having been committed by the plaintiff, the claim for damages was not maintainable.

17. The trial Court held that the rules framed by the Veoparak Sabha were terms of the contract, that there being no privity between the plaintiff and the Allahabad Bank, the defendant could not insist upon the plaintiff paying the balance of the purchase money to the bank, that the defendant was bound to deliver the goods to the plaintiff as the latter was ready and willing to pay the purchase money at the time of delivery, that the breach was committed by the defendant and that the plaintiff's claim was well founded. It gave the plaintiff a decree for Rs. 710-3-0.

18. Certain facts were found by the trial Court which are in the teeth of the pleadings; and the criticism of the lower appellate Court was justified that the trial Court either misread the evidence or did not appreciate it. The result was that certain errors crept into the judgment which could and ought to have been avoided. The trial Court ought to have known that the pit was opened during the trial of the suit long after the due date, that the defendant did not open the pit before the commencement of the action and that it was the case of neither party that the terms of the original contract in the langot had been departed from.

19. The controversy raged over the terms of the contract. Both the Courts below were faced with the difficulty that the original langots which were the most vital of all documents were not before them. There was the further trouble that if the case of the plaintiff was to be accepted, the terms of the contract were to be found not in one self-contained document but had to be gathered from more than one document. Fortunately, however, the documents which had to be looked into for this purpose are instruments prepared by businessmen. These instruments although not drawn up or expressed with scientific precision are clear and unambiguous in which the terms have been set out in elaborate detail and in due order of consecution. There can, therefore, be no difficulty in finding out the real contract between the parties. The rules of the Veoparak Sabha are clear and the terms of the langot are equally clear. No complication arises as to their construction if they are viewed apart or if they are pieced together. We have, therefore, placed the "rules" immediately after the terms of the langot in the earlier part of our judgment, for facility of reference. The examination of the pit disclosed that the weight of the grain contained in it was 515 maunds, out of which 125 maunds were damaged.

20. The lower appellate Court reversed the decision of the first Court and dismissed the suit upon the following findings;

(1) The property in the goods passed to the purchaser from the date of the contract.

(2) The purchaser was liable for all loss or damage to the goods from the result of the flood.

(3) The purchaser was entitled to certain allowances or rebates on the occurrence of certain contingencies as provided for in the rules.

(4) The contract between the parties were in terms of a langot Ex. B. This was a self-contained contract and was not to be supplemented or controlled by the rules of Veoparak Sabha (Meerut Chamber of Commerce).

(5) The resolution of the said Sabha, dated 2nd May 1925, was ultra vires.

(6) The plaintiff was bound to pay the balance of the price before he could insist upon delivery. Actual money should have been tendered. Plaintiff refused to pay before delivery. The plaintiff and not the defendant was guilty of breach of contract.

21. We are not in agreement with all the findings of the learned District Judge, although we are prepared to uphold the decree passed by him. The lower appellate Court had no justification in treating the terms of Ex. B, as the contract between the parties. The finding on this point proceeds upon an alleged "admission":

it is, however,, admitted that the terms are the same as is a blank form which is marked Ex. B in this case.

22. It is not stated whose admission it is and whether the said admission is verbal or written. Likewise, it has not been stated whether the said admission is part of the pleadings in the case. If the lower appellate Court had taken the trouble to compare the entries contained in Ex. B with para. 11 of the written statement it would have been manifest at once to the Court that the terms of Ex. B could not have been the terms of the original contract. In Ex. B the stipulated rate of interest was 14 per cent per mensem. The parties, however, were agreed that in the original contract the rate of interest was 15-annas per cent per mensem which was payable by the plaintiff to the defendant under certain circumstances. The terms of Ex. B also differ in the material particulars from the terms incorporated in the receipt for the earnest money, granted by the defendant to the plaintiff (Ex. 1). The Court below ought not to have assumed that the rules (7 in number) on the back of Ex. B were part of the contract in dispute. There was no allegation and no proof that these rules were part of the contract. We are clearly of opinion that the lower appellate Court was in error in treating the terms of Ex. B, as the contract between the parties.

23. We have already noticed that the Veoparak Sabha was not registered under the Indian Companies Act till 16th June 1925. Certain rules, however, had been framed by the Sabha in anticipation of the Sabha being ultimately registered. We have set out some of these rules. The defendant contends that these rules formed the basis of the contract between the parties and must be treated as terms of the contract as agreed upon, The Court of first instance gave effect to this plea. The lower appellate Court took the contrary view. The finding of the lower appellate Court rests upon the fact that the rules were headed with a note that they were not applicable to transactions prior to the registration of the company. It is argued that the contract in controversy was admittedly made before the registration of the Sabha and that therefore, the rules could not be woven into the contract. There was, however, nothing to prevent the parties from adopting these rules as terms of their contract. This the parties clearly appear to have done. The lower appellate Court was therefore not right in holding that these rules were outside the contract,

24. We have already noticed that the Meerut Veoparak Sabha had passed a resolution on 8th August 1925 calling on persons, whose grain pits were exposed to the risk of damage from the effect of the unusual rainfall which had taken place about this time, either to give the purchaser some other khatti or grain pit by way of substitution or to exercise an option to purchase the grain pit at a

certain price. The judgment of the trial Court was considerably influenced by this resolution, it being of the opinion that the resolution was known to the defendant, that he was bound by it and that he must bear the consequence of not availing himself of the option given. The lower appellate Court came to the conclusion, that the resolution in question was ultra vires and as such was not binding upon the defendant. Under Article 51, Articles of Association no article of association could be ruled out or amended except at a general meeting of the Sabha. The moving or passing of a resolution regulating the business of the members upon the happening of a sudden and unexpected emergency due to unusual rainfall did not amount to an amendment of the Articles of Association. At the outside it was an amendment of the original rules which had been framed for regulating the business of the association, and defining the date upon which the rights and liabilities of the purchasers and sellers of grain pits were to be governed. Article 51 did not apply to the resolution in question and the Court below has evidently erred in holding that the resolution was ultra vires.

25. It does not follow from this that the Court of first instance was right in considering that the resolution was binding upon the parties. The original contract dated 19th May 1925 could not be modified by a subsequent resolution moved by the Veoparak Sabha on 8th August 1925. It was not pleaded in the case that the parties by mutual consent agreed to adopt this resolution as part of their contract. No evidence was adduced to prove that the parties intended to adopt it or that they, as a matter of fact, adopted it. The trial Court therefore was not justified in treating this resolution as a term of the contract and in holding that the defendant was bound by it.

26. In the absence of a usage of trade, it is not open to any body of tradesmen, whether incorporated or not, to amend or nullify a contract entered between its individual members or to substitute a new contract for the old one. No usage of trade has been pleaded or proved. There are no materials before this Court for testing the competency or powers of the Meerut Veoparak Sabha from this standpoint. Indeed, it is not necessary to do so for the purpose of this case. It is manifest to us that the resolution in question whether ultra vires or otherwise, had never been adopted by the parties as part of their contract. We are agreed that the rules of the Veoparak Sabha which we have set out in the earlier part of our judgment must be considered to be part of the contract. The plaintiff has strongly relied upon Rules 9, 11, 17 and 18. Shortly put his contention is that the goods had not been "ascertained" on the date of the contract. It is argued that the goods could not be ascertained so long as the grain pit had not been opened, the goods inspected and weighed and goods answering a particular description apportioned to the plaintiff out of the bulk contained in the pit, and that the seller had to weigh the goods before the price could be determined. On these facts, it is contended that the property in the goods had not passed to the plaintiff and that the latter was not liable to accept the damaged grain which was sought to be forced upon him.

27. The contention of the plaintiff is not sound either in view of the terms of the contract or the law regulating the vesting of ownership. Up till a certain date, the seller was liable for damage arising from tala and musla, i.e., loss arising from sub-soil dampness or from rain-water filtering down into the khatti from the surface of the grain pit. The purchaser was liable to take the grain if damaged by other causes (aal pal). The parties had expected such contingencies and had provided for them in the contract. They had also provided for remedies open to the purchaser. Upon an examination of all the terms of the contract, it is quite plain that the property in the goods was intended to be passed to the purchaser from the date of the contract.

28. u/s 78, Contract; Act,

sale is effected by offer and acceptance of ascertained goods for a price or of a price for ascertained goods together with payment; of the price or delivery of the goods.

29. In *Seath v. Moore* [1886] 11 AC 850, it has been held that it is a question of the construction of the contract in each case at what stage the property shall pass and it is a question of fact in each case whether that stage has been reached. It was held in *Shashi Mohan Pal v. Nobo Kristo Poddar* [1879] 4 Cal 801, that where in a contract for sale of rice so far as vendors were concerned, nothing remained to be done on their part to the rice sold "for the purpose of ascertaining the amount of the price," and the fact that the purchaser has to do something to the goods for his own satisfaction, namely weighing the rice does not prevent the completion of the sale. There is a distinction between a case where something remains to be done by the vendor to the goods for the purpose of putting them into a state in which the vendee is to take them and a case where the vendee for his own satisfaction wants to get the goods weighed for the purpose of ascertaining the amount of the price. This distinction has been recognized in a number of cases and appears to be well founded: *Annan v. Dubar Sheikh* AIR 1923 Oudh 15 (at p. 41 of 26 O.C.) and *Abdul Aziz v. Jogendra Krishna Roy* [1917] 44 Cal. 98. Two rules of civil law appear to have been incorporated both in the Sale of Goods Act and in the Indian Statute with which we are concerned. These rules have been stated by Blackburn, J, to be as follows (Contract of Sale, third edition, 1910, p. 184):

They are two fold: the first is that where, by the agreement, the seller is to do anything to the goods for the purpose of putting them into that state in which the buyer is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property.

The second is, that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods where the price is to depend on the quantity or quality of the goods; the

performance of these things, also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted.

30. In *Simmons v. Swift* 5 B. & C. 857 (at p. 862) the rule has been enunciated as follows:

Generally speaking, where a bargain is made for the purchase of goods and nothing is said about payment or delivery, the property passes immediately so as to cast upon the purchaser all future risks, if nothing further remains to be done to the goods: although he cannot take them away without paying the price. If anything remains to be done on the part of the seller, until that is done the property is not changed.

31. The real question in all such cases is whether the parties did intend that property should pass: *Turley v. Bates* 2 H. & C. 200 (at p. 203) and *Martineau v. Kitching* [1872] 7 QB 456.

32. The true test therefore is what was the intention of the parties. Admittedly the whole of the purchase money had not been paid by the plaintiff to the defendant. It is equally clear that the grain pit was on the date of the contract in the possession of the Allahabad Bank as the pawnee or mortgagee thereof, and it may be presumed that the defendant was not in a position to deliver the goods so long as the mortgage had not been redeemed. This fact was known to the parties and is indeed clearly set out in the langot which contains the contract. Could it have been the intention of the parties that property in the goods was not to pass to the purchaser so long as the balance of the purchase money had not been paid by him, or delivery received by him? If there was a sale of ascertained goods, in the absence of a contract to the contrary, the property in the goods passed at once to the purchaser who must bear all risks and damage to the goods notwithstanding the fact that the entire price had not been paid or delivery taken. The word "ascertained" has not been defined or explained in the Indian Contract Act. According to Chitty (Law of Contracts, 17th edn. 1921, p. 462) the expression means "goods which the parties have agreed upon as the goods to be appropriated to the contract." There is no uncertainty in the present case as to the quantity of the goods sold. The plaintiff under the terms of his contract unconditionally agreed to purchase 504 maunds of wheat. There is no doubt as to the price of the commodity. It was settled at the rate of Rs. 5-9-3 per maund. Nothing remains to be done by the seller for ascertaining the amount of the price. Indeed, the purchaser has paid Rs. 748-9-6 by way of earnest money and has agreed to pay the balance which is also definitely known to be Rs. 2,100. The purchaser is entitled to claim delivery at any time up to Phagun Sudi 5th corresponding to 17th February 1926.

33. We are clearly of opinion that the goods purchased were "ascertained goods" within the meaning of Section 78, Contract Act. The property in the goods did not cease to pass to the purchaser simply by reason of the latter not having found it

convenient to take delivery earlier by payment of the balance of the purchase money. In similar cases in which the parties had agreed that the delivery should be postponed, the Courts have held that the provisions of Section 78, Contract Act, came into operation and the property in the goods passed to the purchaser as soon as the proposal for sale was accepted.

34. The terms of the contract are definite that no delivery was to be made till the balance of the purchase money was paid by the plaintiff to the defendant. It made no difference that the goods were in the possession of the Allahabad Bank as mortgagee. The defendant was entitled to ask the plaintiff to pay the price to the Allahabad Bank and take delivery of the grain. The defendant according to the finding of the Court below, which we must accept, was ever ready to perform his part of the contract. No authority is needed for the proposition that in order to prove that the buyer was ready to carry out his part of the agreement it was not essential for him to show that he actually made a tender of the price. "We have not before us a case of reciprocal promises or simultaneous agreements to pay the price and take delivery. Upon a true construction of the contract, the buyer should have been ready and willing to carry out the bargain on his part in order to insist upon delivery. In *Shriram Rup Ram v. Madan Gopal* [1903] 80 Cal 865 their Lordships of the Judicial Committee have made the following observation:

It is true that no tender was actually made, but; the respondents, naturally enough in view of a rising market were ready and willing to carry out the bargain on their part, and it is proved that they made preparations with the object of having the money ready in hand. More than this they were not required to do by the Contract Act which provides by Section 51 that when a contract consists of reciprocal promises to be simultaneously performed no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

35. The provision of Section 51, Contract Act, is not applicable to the terms of the contract in hand. We have no doubt as to the principles applicable to the transaction between the parties, (1) In the absence of a contract to the contrary, as the presumed intention of the parties and as a matter of law, the property in the ascertained goods passes to the purchaser on the date of the contract. (2) Whether the goods are ascertained or not is a question of evidence and is to be determined with reference to the facts of each case. (3) In the absence of a contract to the contrary, the title to the goods does not cease to vest in the purchaser from the mere fact of postponement of payment of the purchase money or of the delivery of the goods, (4) The seller may insist upon a term in the contract that no delivery shall take place till the payment of the entire purchase money but the incorporation of this term does not per se postpone the title of the purchaser.

36. There was a clear failure of the plaintiff in carrying out his part of the contract. He was not ready with his money. He was not anxious to take delivery

of the goods for he apprehended that the goods had been seriously damaged by the flood and were not marketable. But he was not justified in repudiating his ownership. He had his remedies against the seller which had been definitely and distinctly provided for in the Contract Act. The plaintiff appears to have consciously ignored the terms of the contract and had the cool effrontery to bring a suit for damages against the unoffending defendant where the breach had been committed by himself and not by the defendant. We are of opinion that his suit was rightly dismissed by the lower appellate Court. We dismiss this appeal with costs.