

(1962) 03 KL CK 0019

In the High Court Of Kerala

Case No : Appeal Suits No's. 226 and 241 of 1957

R. Natarajan Ramalingom Chettiar

APPELLANT

Vs

Parasuram Parumal and Co.

RESPONDENT

Date of Decision : 30-03-1962

Acts Referred:

Contract Act, 1872 — Section 73

Sales of Goods Act, 1930 — Section 23, 54

Citation : AIR 1963 Ker 13

Hon'ble Judges : T.K. Joseph, J;T.C. Raghavan, J

Bench : Division Bench

Advocate : C.S. Venkiteswara Iyer, for the Appellant; K.V.R. Shenoi and P.K. Kurien, for the Respondent

Judgement

Joseph, J.—These appeals ar& from the decrees in O. S. Nos. 231 of 1951 and 92 of 1952 respectively of the District Court of Anjikaimal. R, Natarajan, the appellant in both the cases, has the plaintiff in O. S. No. 231 and the defendant in O. S. No. 92. The respondent in both the appeals is Para-suram Perumal, a partner of a firm carrying on business at Bombay. The parties will be referred to as appellant and respondent in this judgment.

2. The transaction which gave rise to the two suits was a contract for sale of 1000 bags of sugar to be sold by the respondent to the appellant. The appellant had paid Rs. 10,000/- as advance towards the price. Each party alleged that the other had committed breach. The appellant sued for recovery of the sum of Rs. 10,000/- paid by him while the respondent's suit was for recovery of damages, the amount claimed being the difference between the contract price and the price fetched by sale of the sugar after the appellant refused to take delivery of the same.

The court below held that the appellant had committed breach and assessed the damages sustained by the respondent at Rs. 23,396-6-0. Accordingly a decree was given to the respondent for recovery of Rs. 13,396-6-0 after adjusting Rs.

10,000/- against the sum of Rs. 23,396-8-0. In view of the adjustment of Rs. 10,000/- as stated above, no decree was given in O. S. No. 231 of 1951. The appellant has therefore filed these appeals. The respondent has tiled a memorandum of cross objections in A. S. No. 241 of 1957 claiming Rs. 4,321-2-9, in addition to what was decreed. The two appeals were heard together.

3. The main question for decision is who committed the breach of the contract.

It is necessary at this stage to state the terms of the contract, Ex. A, dated 24-10-1951 which was in these terms:

"Contract between Parasram Perumal and Co, Merchants and Commission Agents, No. 1047114, Freera Road, Bombay 9, (hereinafter called the Sellers) on the one part and Messrs. Rajan and Co., New Bazar, Alleppey (hereinafter called the Buyers) on the other part, whereby the Sellers have agreed to sell and the buyers have agreed to buy the following goods as per terms and conditions set out hereunder;- Goods....Vuyyur Factory Sugar of E. 27 Grade Quantity.....1000 bags (one thousand bags) of 224-lbs net each Despatch.... 600 bags to be despatched to Cochin Harbour Terminus 400 bags despatch instructions to be intimated to the sellers by the buyers within 31st Oct. 1951. Goods to be despatched within 21 days from the date of Registration for wagon supplies with the Railways, thereafter further extension or cancellation at Buyers" option. Packing... Standard packing Price ...Rs. 1647- (Rupees one hundred and sixty four only) per bag of 224-lbs nett F. O. R. Bezwada including Sales Tax. Payment... Railway receipts to be sent through Bank at Cochin deducting the advance of Rs. 10/- per bag in each wagon. Remarks.., A sum of Rs. 10000/- (Rupees)Ten thousand only) by Bank draft on Bombay representing advance at Rs. 10/- per bag to be paid to the sellers."

The appellant's case in the plaint in O.S. No. 231 was that the respondent informed him by telegram dated 5th and 8th November that sugar had been despatched, that the goods arrived at Cochin Harbour Terminus Station, on or about the 12th, that the respondent wanted to sell the sugar to outsiders as the market was strong at that time but were unable to do so before the price went down and that the appellant sent a telegram to the respondent on the 16th cancelling the contract, to which they replied that they could not agree to the cancellation.

The respondent's representative at Mattancherry sent a telegram to the appellant on the 16th stating that he was drawing on the plaintiff through the Canara Bank Limited for the price of 400 bags, that 600 bags had been despatched from Vijayavada on the 10th November and that he wanted to be told before 6 P. M. on the 17th, whether the defendant was accepting the 600 bags despatched from Vijayavada or the same quantity sent earlier from Masulipatam. It was only then that the appellant knew that the earlier consignment of 600 bags was despatched from Masulipatam, contrary to the contract. According to

the appellant, the respondents thus failed to perform their part of the contract.

The contention of the respondent was that under the terms of the contract they were bound only to despatch from Vijayavada 600 bags within 21 days of registration of wagons and that even calculating this period from 24th October the despatch from Vijayavada on 10th November was in time and that so far as the 400 bags were concerned they were to despatch the same only within 21 days of registration of wagons after the appellant informed them* about the destination, that having despatched the same to Cochin on 7th November they had performed their part of the contract and that the appellant refused to take delivery as the price of sugar had fallen by the time the same arrived at Cochin.

4. The view taken by the learned Judge that the respondents had despatched the goods in time is correct, The last date for despatch of 600 bags of sugar was 13th November but assuming that the despatch of 600 bags from Masulipatam was not in compliance with the contract, the respondents are seen to have despatched 600 bags from Vijayavada on the 10th. The other lot of 400 bags was sent much earlier. It is seen from Exs. M series which are copies of the goods delivery book of the Cochin Harbour Terminus Station that 200 bags reached there on the 12th, 200 bags on the 13th and 600 bags on the 15th of November. Exs. II and III series are the invoices for the purchase of 400 bags of sugar from K. C. P. Ltd., Vuyyur on 8th and 12th November respectively. The respondent paid for these consignments at Bombay on the 14th and 15th of November. Ex. VI series are the Bills drawn by the respondents on the appellants on the 14th. These were received at Mattanehery on the 16th and 17th November. The first set of bills was presented on the 16th of November. 18th November happened to be a Sunday and the bill for the later consignment was presented to the appellant on the 19th. If the goods were despatched from Vijayavada on the last date, the same could not have reached Cochin before the 19th. It is thus seen that the respondents performed their part of the contract. Admittedly the price of sugar had fallen by that time and the appellant was trying to wriggle out of the contract. The default was on the side of the appellant.

5. It follows from the above finding that the respondent is entitled to damages for breach of the contract. This raises a question of importance, namely, whether the respondent is entitled to get the difference between the contract price and the price realised on re-sale or only that between the contract price and the market price on the date of the breach. The respondent claimed the former but the finding of the court below is that he is entitled only to the latter.

The law on the subject has been summarised in Pollock and Mulla's Indian Sale of Goods Act, Second Edition, as follows:

"The question whether a seller of goods has the right of re-sale is important, for where he has such a right he is entitled to claim as damages the difference between the contract price and the amount realised on the re-sale, less the costs of the re-sale while if he has no such rights he is entitled to the difference

between the contract price and the market price on the date of the breach. How the power to re-sell may be either statutory or it may be conferred on the seller by the terms of the contract of sale; in the former case it can be exercised only if the property in the goods had passed to the buyer, as is implied by the words of this section, in the latter case it can be exercised even if the property in the goods has not passed to the buyer. Thus, if it is provided in a contract of "indent" that on default" on the part of the buyer to pay for and take delivery of the goods within a specified time, the seller should be at liberty to re-sell the goods, and that the buyer should pay all the loss arising on the contract with interest, the seller is entitled to re-sell the goods on default on the part of the buyer even if the property in the goods has not passed to the buyer, and to sue the buyer for the loss on re-sale, but it is necessary to the exercise of this power that the goods contracted for should at least have been appropriated for the purposes of the contract. If there has been no such appropriation, there is nothing to which the power of re-sale under the contract could attach, and the seller is not entitled in such a "case to the loss on re-sale, but to the difference between the contract price and the market price at the date of the breach." The terms of the contract in this case had not conferred on the respondent the right of re-sale so that the question is whether he had a statutory right of re-sale. This right would be available only if property in the goods had passed to the buyer. Section 23 of the Sale of Goods Act provides :

"23(1) Where there is a contract for the sale of unascertained or further goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other-bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

On the facts of this case it is impossible to hold that the property in the goods had passed to the respondent. It is conceded that on the date of the contract the goods had not been purchased by the respondent. The same was booked from Bezwada to Cochin by K. C. P. Ltd. addressed to "self". K.C.P. Ltd. sent the railway receipt to the respondent at Bombay through a bank and the price was collected at Bombay only on the 14th and 15th of November. Thereafter the respondent drew demand drafts on the appellant and the same, together with the railway receipts were sent to the respondent's agent at Mattancherry so that the receipts could be handed over to the appellant when the drafts were honoured. No doubt, there was delivery by K. C. P. Ltd., to the railway but the property in the goods remained with K. C. P. Ltd.

We may in this connection refer to the decision of Sen, J. In . It was held:

"There can be no doubt that there may be delivery to the buyer even though the seller retained right of disposal in the goods delivered; but the mere putting of goods on the railway wagons does not necessarily amount to delivery to the buyer. The section, says that the goods must be delivered to the carrier for transmission to the buyer. The section further says that such delivery to the carrier would prima facie be deemed to be delivery to the buyer; the use of the words prima facie shows that even if there be delivery to the carrier for transmission to the buyer circumstances may exist which would prevent such delivery from, amounting to delivery to the buyer. Here the consignee was not the buyer but the seller. The goods were, therefore, being transmitted to the seller and not to the buyer. It cannot be said that the railway had been directed to carry the goods to the buyer and that the seller merely retained some right of disposal. The railway was directed, to deliver the goods to the defendant company and not to the plaintiff firm. In such a case delivery to the railway company cannot be deemed to be delivery to the buyer."

Reference may also be made to the decisions in AIR 1947 169 (Bom.) , Governor-General in Council v. Joynarain AIR 1943 Pat 36 and Majety Balakrishna Rao Vs. Mooke Devassy Ouseph and Sons, , which follows the view stated above. There is an exhaustive review of English and Indian decisions in the last mentioned case, it is unnecessary to refer to other decisions on the point, and it may be taken as settled law that under such circumstances the property in the goods will not pass to the buyer by the mere entrustment of the same to the carrier. This means that the respondent had no right of re-sale and that the quantum of damages can only be the difference between the contract price and the market price on the date of the breach.

6. It was contended on behalf of the respondent that a plea in this specific form was not raised in the written statement. This is not correct as the appellant had stated in paragraph 7 of the written statement in O. S. No. 92 of 1952 that the plaintiffs had no right of re-sale. It is clear from the judgment under appeal that the parties were aware of the nature of the contention. The learned judge dealt with this question as the most important one in the case.

7. The question of assessment of damages due to the respondent remains. According to the appellant, the respondent need not have delayed the sale of sugar as he has intimated as early as 11th November that he was unable to accept the goods. The goods had arrived at Cochin by the 15th and on the 16th the plaintiff sent another telegram that the contract was cancelled. This also is relied on for fixing the date of breach as the 16th.

There is no force in this contention as it was open to the respondent to treat the contract as subsisting notwithstanding the repudiation. According to the contract the respondent had to tender the goods and this they did by sending the railway receipt through the Canara Bank Limited and the Central Bank of India Limited. The refusal of the appellant to accept 400 bags was intimated to the respondent on 19-11-1951 (Ex. XVI) and that of 600 bags on 22-11-1951 (Ex. XX). The

breach must therefore be taken as having been committed on the 19th and 22nd of November and the goods having been despatched in time, the respondent is entitled to claim the difference in price on these dates.

8. The market price of sugar at Cochin fluctuated between Rs. 153.75 and Rs. 154.50 on the 19th and Rs. 151.25 and Rs. 147.50 on the 22nd, The learned Judge adopted the lower figure for each of these days on the ground that nobody would be prepared to buy in a falling market. We are unable to accept this view and we consider it fair to adopt the average price on these days for assessing damages. Accordingly the price on 19th November is fixed as Rs. 154.13 and on the 22nd as Rs. 149.38 (rounding off the half naya paise). On this basis the market price of 400 bags on the 19th is Rs. 61,652 and of 600 bags on the 22nd, Rs. 89,623/- or Rs. 1,52,280/- for 1000 bags. The contract price for 1000 bags was Rs. 1,64,000/- and so the difference comes to Rs. 12,720/-.

9. Certain other items have to be added to this, such as freight, etc. The railway freight is Rs. 5,485.62. Amount incurred for unloading and transport was Rs. 507.50, sales tax Rs. 1,903.25, and demurrage Rs. 1,593.1. The learned judge held that the appellant was to bear Rs. 1,500/- out of the sum incurred as demurrage. We consider this excessive as unloading took place only on 21st, 23rd and 24th. A substantial part of this could have been avoided and the respondent had a duty to do so. Considering the fact that the documents were presented only a few days after the consignment arrived at Cochin and that the respondent did not promptly clear the goods even after the appellant dishonoured the demand drafts, the appellant cannot be mulcted with more than half the sum incurred under this head. The total charges that the appellant should bear thus comes to only Rs. 8,692.93. This added to the difference in price amounts to Rs. 21,412.93. The sum of Rs. 10,000/- paid as advance by the appellant has to be deducted from this and the respondent given a decree for Rs. 11,412.93 only.

10. In view of our finding that the respondent had no right of re-sale, the memorandum of cross objections in A. S. No. 241 of 1957 must be dismissed.

11. In the result, we confirm the decree in O. S. Mo. 231 of 1951 and dismiss A. S. No. 226 of 1957 with costs. The decree in O. S. No. 92 of 1952 is modified and the plaintiff in that suit is given a decree for recovery of Rs. 11,412.93 with interest at six per cent per annum from the date of suit till this date and Mure interest at the same rate on the aggregate amount from this date A. S. No. 241 of 1957 is allowed only to the above extent and is dismissed in other respects, We allow proportionate costs in A. S. No. 241 of 1957. The memorandum of cross objections in A. S. No. 241 of 1957 is dismissed with costs.