
(1943) 02 BOM CK 0015
In the Bombay High Court
Case No : O.C.J. Suit No. 1485 of 1942

Rameshwardas Poddar

APPELLANT

Vs

The Paper Sales, Ltd.

RESPONDENT

Date of Decision : 02-02-1943

Acts Referred:

Citation : AIR 1944 Bom 21 : (1943) 45 BOMLR 906

Hon'ble Judges : Chagla, J

Bench : Single Bench

Judgement

Chagla, J.—On November 18, 1942, the defendants sold to the plaintiff 640 gross, 31 1/2" X 41 1/2", 70 lbs. per gross, in all 44,800 lbs. at as. 11 and pies 9 per lb. Dalmia White Duplex paper. The total purchase price for the goods came to Rs. 32,900, and the plaintiff paid that price to the defendants on that very day. On that very day also the defendants handed over to the plaintiff a delivery order issued by the Dalmia Cement and Paper Marketing Company, Limited, in favour of the defendants bearing No. 370 dated November 18, 1942, for 640 gross.

2. On the same day, namely, November 18, 1942, the plaintiff sold the goods to another firm called Pavri Sons & Co, and the plaintiff in his turn handed over the delivery order to Pavri Sons & Co. endorsing thereon as follows :- "Please deliver to bearer." Messrs. Pavri Sons & Co. failed to obtain delivery pursuant to this order from the Dalmia Cement and Paper Marketing Company, Limited. Messrs. Pavri Sons & Co. handed back the delivery order to the plaintiff. The plaintiff thereupon wrote to the defendants pointing out that no delivery had been obtained under the delivery order and asking for immediate delivery. The defendants asked the plaintiff to attend at the godown of the Dalmia Cement and Paper Marketing Company, Limited, on November 21, 1942, to take delivery of the goods. The plaintiff did so, but failed to obtain delivery. The plaintiff further waited at the defendants instance till November 27, 1942, but no delivery was given to him, and he has filed this suit for the return of the price paid by him,

namely, Rs. 32,900 on the basis of a total failure of consideration and also asking for damages for breach of contract on the part of the defendants.

3. The main and salient facts of this case are not disputed. It is not disputed that the plaintiff purchased the goods and paid the full price, nor is it disputed that the plaintiff failed to obtain delivery of the goods pursuant to the delivery order given to the plaintiff by the defendants, A very curious defence is taken in the written statement and strenuously urged before me at the hearing. The defendants plead in their written statement that it was agreed between them and the plaintiff that the defendants should give delivery of the goods to the plaintiff by transferring and handing over the delivery order to the plaintiff against payment of the price of the goods by the plaintiff to the defendants, I have not permitted Mr. S.M. Shah for the defendants to lead evidence whether in fact such an agreement was arrived at or not, because, in my opinion, even if the defendants succeed in establishing that such an agreement was arrived at, it would make no difference whatever to the legal position because, even assuming that there was such an agreement between the parties, the written statement on the face of it discloses no defence whatsoever to the plaintiff's case.

4. It has been urged by Mr. Shah on behalf of the defendants that as soon as the defendants handed over the delivery order to the plaintiff they performed the contract and they discharged all their obligations under the contract. It was no longer their concern whether in fact the plaintiff obtained delivery under the delivery order or not. According to Mr. Shah, all that the plaintiff had contracted to buy was this piece of paper on which an order was given by the defendants upon the Dalmia Cement and Paper Marketing Company, Limited, to deliver to the plaintiff what he had purchased from the defendants. Mr. Shah has failed to adduce any authority in support of this proposition-and rightly so-because, in my opinion, there cannot be any authority for a proposition of so extraordinary and untenable a character. It is perfectly clear to my mind that the plaintiff was quite prepared to take constructive delivery of the goods by accepting the delivery order. Ordinarily and normally a party buying goods is entitled to call upon the vendor to give him physical delivery of the goods, but by agreement a purchaser may say : "I will be satisfied if you will give me constructive delivery. I will go and get the goods myself". But that assumes that the delivery order which the plaintiff takes is an effective order-an order which can ultimately be translated into actual goods. It cannot possibly be contended that although the delivery order did not result in any goods being delivered to the purchaser, the purchaser has no cause of action against his vendor. The delivery order was given on the Dalmia Cement and Paper Marketing Company, Limited; in law they were the agents of the defendants for the purpose of giving delivery to the plaintiff. Unless the plaintiff had agreed to make them his agents and had asked them to hold the goods on his behalf, the plaintiff had every cause of action against the defendants for non-delivery of the goods if the goods in fact were not delivered.

5. I, therefore, hold that in failing to give delivery of the goods purchased by the

plaintiff from defendants-and the failure is not disputed or denied-the defendants have committed a breach of the contract, inasmuch as there is a total failure of consideration, because the plaintiff has failed to obtain the goods which he purchased and for which he has paid the purchase price The plaintiff is therefore entitled to the return of the purchase price, viz. Rs. 32,900.

6. The next question to determine is what are the damages to which the plaintiff is entitled by reason of the breach of the contract by the defendants. It is contended by Mr. J.H. Vakeel that inasmuch as the plaintiff had paid the purchase money in full and has been kept out of it till today, the ordinary measure of damages in cases of breaches of contract, viz the difference between the contract price and the market price, ought not to be adopted but the plaintiff is entitled to damages on the basis of the market rates prevailing today, i.e. at the date of the trial. In support of this contention Mr. Vakeel has relied on the statement of law to be found in Halsbury's Laws of England, Hailsham Edition, Volume X, p. 124, para. 157 :

In the cases thus far considered the price of the goods had not been paid when the failure to deliver occurred. When goods are paid for at the time of the purchase and the seller fails to deliver them, the measure of damages has been held at nisi prius to be the value of the goods at the time of the trial.

In support of this statement of law the case of Elliot v. Hughes (1863) 3 F. & F. 387 is relied upon. In that case the defendant had contracted with the plaintiff to sell and deliver to him seven pockets of hops at a certain price which was paid, and the breach alleged was non-delivery of those hops. It was argued at the Bar on behalf of the plaintiff that the rule that the measure of damages for the non-delivery of goods purchased was the market price at the time of the breach of the contract applied only where the goods were not paid for at the time of the purchase, in which case it was said that the buyer not having parted with his money, could go with it into the market and buy at the current price; but that a different rule prevailed where the price was paid at the time of the purchase. Mr. Justice Byles apparently accepted this argument and decided in favour of the plaintiff.

7. Benjamin on Sale of Personal Property at p. 999 accepts the same statement of the law and deduces from the statement the principle which was contended for at the Bar in the case I have referred to, namely, that the ground on which the damages are assessed on this basis is that the buyer no longer has in his hands money for the purchase of similar goods in the market.

8. In Halsbury's Laws of England, Hailsham Edition, Vol. XXIX, p. 199,. para. 267, the statement of law is enunciated differently as follows :

Where the price has been prepaid by the buyer, he is naturally entitled to recover the price in addition to any other damages he may obtain. The price is recoverable as money had and received, and the Courts may grant interest thereon. It is submitted that, apart from the recovery of the price, the buyer is

only entitled to damages ascertained on the same principles as where the price has not been paid, but some of the older cases suggest the contrary.

9. Therefore, it is clear that, according to the Hailsham Edition of Halsbury's Laws of England, Vol. XXIX, the better and the more modern view of the law is that there is no difference in the measure of damages whether the price is prepaid or not. The measure is the difference between the contract price and the market price prevailing at the date of the breach. In this Volume of Halsbury's Laws of England an earlier case has also been referred to, viz. *Startup v. Cortazzi* (1835) 2 Cr. M. & R. 165. In this case the defendant agreed to sell linseed and part of the purchase price was paid in advance by the plaintiffs. The defendant then gave notice to the plaintiffs that he would not be in a position to deliver the goods, and the plaintiffs filed a suit for breach of contract claiming damages. In this case also it was contended that the damages should be ascertained, on the basis of the market rate prevailing at the date of the trial. This contention was rejected by the Court, and Baron Alderson, in delivering the judgment, said (p. 169) :-

The more correct criterion is the price at the time when the cargo would have arrived in due course according to the contract; when, if it had been delivered, the plaintiffs would have been enabled to resell it. Another criterion is, to consider the loss of the gain which the party would have made, if the contract had been complied with. In the present case, the loss which the plaintiffs have sustained arises from their having been kept out of their money. That is a matter to be calculated to the interest of the money up to the time when, by the course of practice, the money could have been obtained out of Court.

10. Sir Dinshah Mulla in his treatise on the Indian Sale of Goods Act also adopts the view taken of the law in Halsbury's Laws of England, Hailsham Edition, Vol. XXIX. At p. 300 of his book he says :

The better view, however, appears to be that even so the date to be taken is the date of the breach, and in addition to recovering the difference between the market and contract price on that date, the buyer may also recover the price prepaid with interest.

11. In this case no special damages are claimed by the plaintiff, and I think that the only additional damages that he has suffered is that he has been kept out of his money wrongfully by the defendants and, in my opinion, the proper measure of such damages would be to compensate him for having been kept out of his money by the defendants; and the proper way to compensate him for this would be to allow him interest on the amount paid by him from the date when it was paid till judgment in this suit.

12. Apart from the loss of the use of the money, the plaintiff would also be entitled to damages for breach of contract on the usual basis-the measure of damages being the difference between the contract rate and the market rate. Fortunately in this case there is no difficulty about ascertaining the market rate.

The contract was entered into on November 18, 1942, and on the same day the plaintiff entered into a contract to sell these very goods to another purchaser for a larger amount, viz. Rs. 36,400. The plaintiff entered into this contract on the assumption that delivery of the goods would be given to him by the defendants and that he in his turn would be able to give delivery of them to his purchaser. Therefore, we have the actual market rate at the exact time of the breach, namely, November 18, 1942, when the plaintiff sold the goods to his purchaser for Rs. 36,400 of which he could not give delivery.

13. Mr. Vakeel contends that the date of the breach is not November 18, 1942, because time for giving delivery was extended by consent, and for this purpose he relies on the correspondence between the parties prior to the filing of the suit. It seems from the correspondence that the plaintiff, as soon as he could not get delivery from the Dalmia Cement and Paper Marketing Company, Limited, made a complaint about it to the defendants. The defendants promised to do what they could to get the Dalmia Cement and Paper Marketing Company, Limited, to give delivery and the plaintiff agreed to wait for this purpose. Apparently the plaintiff's patience was exhausted on November 27, 1942, and he threatened to take legal proceedings, which he ultimately did on December 2, 1942. Now no extension of the time for delivery is pleaded in the plaint. It is to be remembered that the defendants gave the delivery note to the plaintiff with the intention that he should get delivery of the goods on that very date. In fact the handing over of the delivery note constituted a constructive delivery on the part of the defendants, and the breach on the part of the defendants lay in the fact that their order upon their agents, the Dalmia Cement and Paper Marketing Company, Limited, was not acted upon, and the Dalmia Cement and Paper Marketing Company, Limited, did not give delivery of the goods pursuant to the delivery order to the plaintiff. In my opinion, therefore, the breach of the contract took place when the Dalmia Cement and Paper Marketing Company, Limited, failed to give delivery to the plaintiff of the goods covered by the delivery note. That was on November 18, 1942. Therefore, the damages to which the plaintiff is entitled for the breach of the contract is the difference between Rs. 36,400 which, according to him, is the market rate and Rs. 32,900 which is the contract rate, namely, Rs. 3,500.

14. There will, therefore, be a decree for the plaintiff for Rs. 32,900 with interest thereon at the rate of six per cent, from November 18, 1942, till judgment. There will also be a decree for Rs. 3,500 as and by way of damages costs of the suit, and interest on judgment at six per cent.