
(1985) 09 CAL CK 0022
In the Calcutta High Court

Case No : A.F.A.D. No. 1143 of 1979 with Civil Rule No. 2612 (s) of 1979

Sadhusaran Singh

APPELLANT

Vs

West Bengal State Electricity Board and Another

RESPONDENT

Date of Decision : 19-09-1985

Acts Referred:

Sales of Goods Act, 1930 — Section 2(14), 2(3), 20, 21, 22

Citation : AIR 1986 Cal 240 : 90 CWN 151

Hon'ble Judges : S.N. Sanyal, J; Anil K. Sen, J

Bench : Division Bench

Advocate : B.C. Dutt, Sudhis Das Gupta and Pradipta Ray, for the Appellant;
S.K. Mookerjee, for the Respondent

Final Decision : Allowed

Judgement

S.N. Sanyal, J.—This appeal, at the instance of the plaintiff, is directed against the judgment and decree of the learned Additional District Judge, Darjeeling in O. C. Appeal No. 7 of 1973 dismissing the plaintiffs suit after reversing the judgment and decree of the learned Subordinate Judge, Darjeeling in O. C. Suit No. 22 of 1971.

2. The plaintiff instituted the suit for declaration of title to certain goods and for permanent injunction. The plaint case was that by a sale notice dt. March 3, 1970 tenders were invited by the defendant No. 2, Superintending Engineer (South), Jaldhaka Hydel Project of the defendant No. 1. West Bengal State Electricity Board, for the sale of 450 Metric Tonnes of M. S. Rounds of 28 dia lying at Chapramari Store Yard and 150 Metric Tonnes of M. S. Rounds of 37 dia lying at Jhalong Store Yard of the defendant No. 1. The plaintiff submitted his tender for the same and the said tender was accepted on May 4, 1970 and a contract of sale of the aforesaid articles was made between the plaintiff and the defendants and as a result of the sale the title to the goods passed to the plaintiff as the contract was for the sale of specific goods in a deliverable state. According to the agreement between the parties, the payment of the price of the

goods and the delivery thereof were postponed and it was also agreed that payment would be made in six instalments within 90 working days from the date of the receipt of the release order and the period of delay in lifting the materials due to reasons beyond the "control of the plaintiff would be excluded. The plaintiff removed the entire quantity of 150 Metric Tonnes of M. S. Rounds of 37 dia from Jhalong Store Yard and he had also removed 200 Metric Tonnes out of 450 Metric Tonnes of M. S. Rounds of 28 dia from the Chapramari Store Yard. The plaintiff in spite of his best efforts could not remove the balance quantity of 250 M. T. of M. S. Rounds of 28 dia from Chapramari Store Yard due to circumstances beyond his control because of heavy breaches on the road due to rain, landslide and other causes. It was not possible for the plaintiff to obtain the necessary transport communication for the carriage of the said materials. Due to sudden failure of electricity at Jaldhaka Hydel Project of the defendant No. 1, the running of the factory of the plaintiff had to be suspended and the plaintiff was granted extension of time till January 31, 1971. As the time was too short, the plaintiff could not make arrangement for removal of goods. The plaintiff requested the defendant No. 2 to grant further extension of time for a reasonable period but the said prayer was refused and the defendant No. 2 by his letter dt. April 20, 1971 informed the plaintiff that the sale order of the balance quantity of the goods which had not been lifted had been cancelled. Thereafter the plaintiff made several representations to the defendants against the order of cancellation and the plaintiff was assured that the order would be reconsidered.

However, in utter disregard of such assurance, the defendants were trying to remove the remaining goods from the Store Yard for reselling to other parties. The purported order of cancellation was illegal, invalid and without jurisdiction as under the contract of sale the property in the goods in question had duly passed to the plaintiff. The plaintiff was thus compelled to institute this suit for declaration of his title to the balance quantity of 250 M. T. of M. S. Rounds of 28 dia lying at Chapramari Store Yard and for permanent injunction restraining the defendants from removing the said goods and from reselling the same.

3. In their joint written statement the defendants denied that the property in the goods passed to the plaintiff on acceptance of the tender. The defendants further denied that the contract in question was for sale of specific goods in a deliverable state. The contract was nothing but an agreement to sell. As the transfer of property in this case was to have taken place at a future time and subject to some conditions to be fulfilled the property in the goods thus did not pass to the plaintiff as alleged. The goods were not specific goods and they were not in a deliverable state. The disputed M. S. Rounds were kept at the Store yard of the defendant along with other M. S. Rounds which were not covered by the contract. In the work order, it was clearly stated that the whole quantity of M. S. Rounds covered by the contract would be lifted by the plaintiff on advance payment for the materials within the stipulated time. The property in the goods as well as the possession of the same remained with the defendants till full value

of the materials was deposited with the defendants. The plaintiff lifted 200 M. T. of M. S. Rounds of 28 dia and 150 M. T. of M. S. Rounds of 37 dia but the plaintiff did not take delivery of the remaining M. S. Rounds of 28 dia by paying the price. The plaintiff failed to fulfil his obligations in spite of extension of time. At the request of the plaintiff the original stipulated time was extended from time to time till March 31, 1971 but still the plaintiff could not fulfil his obligations. The contract was legally cancelled as he failed to lift the articles within March 31, 1971. The plaintiff was not entitled to declaration and permanent injunction prayed for.

4. The learned Subordinate Judge came to the conclusion that the goods in question were specific goods in a deliverable state and as such the property in the goods passed to the plaintiff when the contract was made. The learned Subordinate Judge further held that the contract was concluded and as the property passed to the plaintiff, he became the owner thereof. The learned Subordinate Judge has further held that in the instant case time was not the essence of the contract. The learned Subordinate Judge decreed the suit in plaintiff's favour holding that the plaintiff had valid and legal title to the goods in dispute, namely, 250 M. T. of M. S. Rounds of 28 dia lying at Chapramari Store Yard of the defendants. The learned Subordinate Judge also granted a decree for permanent injunction restraining the defendants from removing the said goods and from reselling the same to any other person. The defendants were further granted liberty to impose penalty for the delay in lifting the goods in suit from the Store Yard of the plaintiff in terms of the conditions in the sale notice.

5. Being aggrieved by the said decision, the defendants preferred O. C. Appeal No. 7 of 1973. The learned Additional District Judge held that in the instant case there was an agreement for sale and not an unconditional contract for sale of specific goods in a deliverable state. The learned Additional District Judge also held that Section 20 of the Sale of Goods Act was not applicable. The property in the goods did not pass to the plaintiff and the plaintiff was not entitled to declaration of title and permanent injunction. The learned Additional District Judge allowed the appeal and dismissed the suit.

6. Being aggrieved, the plaintiff has preferred the present appeal before this Court. Mr. B. C. Dutt, learned Advocate for the appellant, has raised several points. It has been argued that there was a sale of specific goods in a deliverable state and as such the property in the goods passed to the plaintiff. The plaintiff has taken part delivery of the articles and it was thus not open to the defendant to cancel the contract. As there was a sale of specific goods in a deliverable state, it was immaterial that the time of payment of the price and the time for delivery of the goods were postponed. According to Mr. Dutt, the only remedy of the defendant was to sue for unpaid price or damages for delay in taking delivery but they had no right to cancel the contract. According to Mr. Dutt, the conditions regarding payment of delivery do not disentitle a contract to be considered to be an unconditional contract within the meaning of Section 20 of the Sale of Goods

Act. Even if the contract lays down certain terms regarding postponements of payment of the price or the time of the delivery, the provisions of Section 20 of the Sale of Goods Act would apply if there was a sale of specific goods in a deliverable state. It has been contended that the plaintiff has taken part delivery of the articles and the vendor has no right to repudiate the contract. Mr. Dutt submits that the learned Additional District Judge did not consider all the relevant materials in this respect in overruling the findings of the learned Subordinate Judge. The articles sold were identified and agreed upon at the time of the sale and the articles were also in a deliverable state. The vendor had nothing to do before delivery was taken by the vendee. The learned Additional District Judge came to an erroneous conclusion against the principles of law and as such the decision of the teamed Judge should be set aside and that of the learned Subordinate Judge shall be restored.

7. The learned Advocate for the respondent has contended that there was no contract for sale. There was only an agreement to sell on fulfilment of certain conditions. In the instant case, there was no sale of specific goods in a deliverable state and the learned appellate court was correct in holding that the provisions of Section 20 of the Sale of Goods Act did not apply. The intention of the parties in the instant case was that property in the goods would pass on payment of price. As there was failure on the part of the plaintiff to pay the balance price within the time the defendants had the right to cancel the contract. The intention of the parties was that the delivery would take place on payment and as such the contract was not an unconditional contract. The learned appellate court was thus justified in dismissing the plaintiff's suit.

8. There is no dispute that by a notice dt. March 3, 1970 tenders were invited by the defendant No. 2 for sale of 450 Metric tonnes of M. S. Rounds of 28 dia lying at Chapramari Store Yard and 150 Metric tonnes of M. S. Rounds of 37 dia lying at Jhalong Store Yard of the defendants. The plaintiff submitted tender and the same was accepted by the defendants on May 4, 1970. It is also not disputed that the plaintiff took delivery of 150 Metric Tonnes of 37 dia lying at Jhalong Store Yard and he also took delivery of 200 Metric Tonnes of M. S. Rounds of 28 dia from Chapramari Store yard. The plaintiff has instituted the suit for declaration of his title to 250 Metric Tonnes of M. S. Rounds of 28 dia at Chapramari Store yard and for permanent injunction restraining the defendants from removing the said articles from Chapramari Store Yard and from reselling the same to any other person. According to the plaintiff, in view of the contract for sale the property in the goods passed to the plaintiff and though the plaintiff; due to certain unavoidable reasons, could not take delivery of the articles within the stipulated time, the defendants have no right to cancel the contract and to resell the same. The defence contention is that the contract in question was nothing but an agreement to sell and as such the property in the goods did not pass to the plaintiff. The defendants have denied the plaintiff's contention that the contract was in respect of sale of specific goods in a deliverable state. The defence contention is that there was an agreement for sale in respect of

unascertained goods as 450 Metric Tonnes of M. S. Rounds of 28 dia were lying in a heap along with other materials of the defendants lying at Chapramari Store Yard. The Subordinate Judge upheld the plaintiff's contention and granted a decree in favour of the plaintiff. The learned Additional District Judge has however disagreed with the decision of the learned Subordinate Judge that the provisions of Section 20 of the Sale of Goods Act, 1930 (hereinafter referred to as the Act) would apply in the present case. The learned Additional District Judge has held that the instant case is governed by Section 22 of the Act and the contract was an agreement to sell and the property in the goods did not pass to the plaintiff.

9. According to Section 2(3) of the Act, goods are said to be in a "deliverable state" when they are in such state that the buyer would under the contract be bound to take delivery of them. In Section 2(14) of the Act "specific goods" has been defined to be goods identified and agreed upon at the time a contract of sale is made. Section 4 of the Act deals with sale and agreement to sell. A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. A contract of sale may be absolute or conditional. Where under a contract of sale the 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 subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. 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. A contract for sale becomes a sale when the property in the goods is transferred to the buyer under the terms of the contract. In the case of agreement to sell the property in the goods forming the subject-matter of the contract remains with the seller. In the case of specific goods, the parties may transfer the property by the contract itself and in such a case the property in goods passes to the buyer. In the case of specific goods ascertained at the time of the contract, the intention of the parties expressed in the agreement will determine whether the contract amounts to a sale or an agreement to sell. According to Section 11 of the Act, unless a different intention appears from the terms of the contract, stipulations as to the time of payment are not to be deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. Section 12 of the Act deals with condition and warranty. A stipulation in a contract of sale may be a condition or a warranty. A condition is a stipulation therein to the main purpose of the contract the breach of which gives rise to a right to treat the contract as repudiated. A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition though called a warranty in the contract. Section 19 of the

Act lays down that where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intended it to be transferred. In ascertaining the intention of the parties, regard shall be had to the terms of the contract, conduct of the parties and the circumstances of the case. This section lays down that unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

10. The main controversy between the parties is whether the instant case comes u/s 20 of the Act as held by the learned Subordinate Judge or u/s 22 of the Act as held by the learned court of appeal below. The learned Advocate for the appellant has contended that the case will come u/s 20 of the Act as there was, sale of specific goods in a deliverable state and the seller had nothing to do before delivery was taken by the buyer. The learned Advocate for the respondent on the other hand has argued that the goods in question were sold subject to certain conditions the fulfilment of which must take place before the property in the goods would pass to the buyer and as such there was an agreement to sell.

11. According to Section 20 of the Act, 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. It is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

12. According to Section 21, any contract for the sale of specific goods where the seller is bound to do something for putting the goods in a deliverable stage, the property does not pass until such thing is done and the buyer has notice thereof. Section 22 of the Act deals with contract for sale of specific goods in a deliverable state but the seller has to do something thereto in order to ascertain the price. Section 23 of the Act is in respect of sale of unascertained goods and appropriation. Section 24 of the Act deals with goods sent on approval or "on sale or return".

13. In support of his contention that the property in the goods passed to the buyer in the instant case, Mr. Dutt has referred to the case of AIR 1948 20 (Privy Council) . In this case, A entered into a contract with B by which A sold certain quantity of wool to B. It was recited in the contract that A was to give the wool in possession of B within five days and that A had received certain amount by way of earnest money when the wool was given in possession of B, that if the wool was not transferred within the time or if B did not take it. B or A was to have damages, and lastly, that if the wool was found rotten in any way, B would have right to take out of it after making choice. It was held that in this decision that the contract was for the sale of ascertained goods and the parties intended that the property in the goods would be transferred to the purchaser B on the signing of the contract. The last condition was a warranty given by A, the existence of which did not prevent the property from passing. Mr. Dutt has also referred to

the case reported in AIR 1935 182 (Privy Council) . It has been held in this case that the rule for determining the time when the property in the goods passed to the buyer is contained in Section 19 of the Indian Sale of Goods Act. That section provides that in the case of contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. The intention of the parties is thus the decisive factor in determining the issue and if that intention is expressed in the contract itself, no difficulty arises. But where the contract contains no such express provisions the intention has to be gathered from the conduct of the parties and the circumstances of the case. Another decision referred to by Mr. Dutt is reported in (1906) 3 Cal LJ 249 (Rash Behari Shaw v. Naritya Gopal Nundy). In this case there was a contract to deliver goods in two instalments and the plaintiff failed to tender for or take delivery of the first instalment although the market was in his favour but as regards the second instalment, the plaintiff made a tender which the defendant refused to recognise because of such failure. It was held by their Lordships that under the circumstances the conduct of the plaintiff had not amounted to a renunciation, to an absolute refusal to perform the contract, as such would amount to a rescission and thus the defendant could not accept it as a reason for not performing his part. Mr. Dutt has also referred to the case of Simson v. Virayya ILR 1886 Mad 359. In this case, the defendant, who was the respondent, on 6th March 1903 promised to sell 5000 bags of gingelly seeds at Rs. 7-11 as a bag to the appellants. Two-thirds of the price was paid in advance. The respondents agreed to deliver the 5000 bags at the end of April and to give the appellant a notice as instalments of 1000 bags were ready for delivery within the stipulated time and the appellants promised to pay the respondent the balance of the contract price on each instalment when ready for delivery. There was neither delivery nor payment in terms of the contract. 300 bags were delivered by the respondents but the appellants did not pay the balance of the price due and 2000 bags were never delivered. On 7th May the respondent declined to deliver those bags on the ground that the appellants had not paid the balance at the contract price for 3000 bags delivered when ready for delivery and subsequently repaid to the appellants the balance due of the money advanced. It was held that the appellants' conduct did not amount to renunciation of the contract or to absolute refusal of future performance. The learned Advocate for the respondents has referred to the case of The Collector of Customs and Others Vs. Pednekar and Company (Private) Limited (In Liquidation) and Another, . The contract in this case related to goods which were on high seas. It was held that the goods did not pass to the buyer till the time of the delivery of the goods in Bombay and no specific goods in a deliverable state were attached to the contract when it was made. Another decision referred to by the learned Advocate for the respondents is P.S.N.S. Ambalavana Chettiar and Co. Ltd. and Another Vs. Express Newspapers Ltd., Bombay, . It has been held that the seller can claim as damages the difference between the contract price and the amount realised on resale of the goods where he had the right of sale u/s 54(2) of the Sale of Goods Act. The statutory power of resale u/s 54(2) arises if

the property in the goods had passed to the buyer subject to the lien of the unpaid seller. Where the property in the goods has not passed to the buyer the seller has no right of resale u/s 54(2).

14. By the sale notice (Ext. 4) defendants had invited three tenders for the purchase of 450 Metric Tonnes of M. S. Rounds of 28 dia lying at Chapramari Store Yard and 150 Metric Tonnes of M. S. Rounds of 37 dia lying at Jhalong Store Yard which the Intending parties could inspect. The M. S. Rounds were to be measured at the cost of successful bidders and calculated as per sectional weight chart of IISCO and TISCO. The materials were to be removed within three months" time of payment of full tender amount in advance. For any delay beyond three months a penalty of Rs. 100/- per week or part thereof would be imposed on any quantity left over unlifted. The plaintiff's tender was accepted by Ext. 3 dt. May 4, 1970. The rate was fixed. The plaintiff was requested to complete the removal of the entire materials after depositing the value of each of these instalments by August 15, 1970. The plaintiff removed 150 Metric Tonnes from Jhalong Store Yard and he also removed 200 Metric Tonnes from Chapramari Store Yard. The plaintiff could not complete the removal within the stipulated time and he prayed for extension of time and the plaintiff was granted time till March 31, 1971 for the removal of the balance of the M. S. Rounds and he was told that no further extension would be entertained. By the letter (Ext. 1) dt. April 20, 1971 the defendant cancelled the sale order. It will appear from the evidence on record and the circumstances of the case that there was contract for sale of specific goods in a deliverable state. The defendant had nothing to do before delivery was taken by the plaintiff. The measurement in accordance with the sectional weight chart of IISCO and TISCO contained in the notice (Ext. 4) was for the satisfaction of the plaintiff. The Ledger Book of the Chapramari Store Yard regarding the quantity stocked there would show that the weight of the quantity stocked would be approximately 450 Metric Tonnes. The contention of the defendants that the M. S. Rounds sold from the Chapramari Store Yard were mixed up with other materials is not borne out by the evidence on record. Having regard to the materials on record and the circumstances of the case, the contention of Mr. Dutt that the instant case comes u/s 20 of the Act has to be accepted. The learned Additional District Judge was not correct in holding that the case was covered by Section 22 of the Act. As there was a contract of specific goods in a deliverable state the property in the goods passed to the buyer, namely, the plaintiff. The plaintiff has also taken part delivery of the articles and the defendants are not entitled to cancel the contract and resell the balance of the articles. The decision of the Court of Appeal below should thus be set aside and the decision of the Trial Court should be restored.

15. The appeal thus succeeds and it is allowed. The judgment and decree of the learned Court of Appeal below be set aside and those of the learned Trial Court be restored. There will be no order as to costs in this appeal.

16. The appeal having been disposed of, the Rule becomes infructuous and it is

discharged.

Anil K. Sen, J.

17. I agree.