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In the Bombay High Court

Scott and Hodgson Limited — APPELLANT

Vs

Keshavlal-Nathubhai Shah — RESPONDENT

Date of Decision : 03-04-1930

Acts Referred:
Contract Act, 1872 — Section 77, 83

Citation : 128 Ind. Cas. 26

Hon'ble Judges : Amberson Marten, C.J;Patkar, J

Bench : Division Bench

Judgement

Amberson Marten, C.J.—The plaintiffs are appealing against the judgment of the learned First Glass Subordinate Judge of Ahmedabad on the ground that he has wrongly decided in the negative the point of law involved in issue No. 1, namely, whether the agreement between the parties that the property in the suit goods should not pass until the whole of the purchase price had been paid, was valid and effective having regard to Sections 83 and 77 of the Indian Contract Act of 1872. There were several other issues raised in the case all of which were decided in favour of the plaintiffs And there are cross-objections before us in respect of them. But we have taken first this point of law because it is the decisive issue in the suit in certain events.

2. The contract which was made in India is contained in three letters of February 1, 9 and 9, 1923. By the first letter, Ex. 42, the plaintiffs were to supply an engine and a boiler therein specified for in all ? 3,480 packed and delivered for shipment f o. b. Manchester or Birkenhead on the terms that one third of the total value was to be paid on signing the order and the balance against shipping documents through Banks in England and subject to usual strikes, lock outs, etc Delivery was to be given within from five to six months after the receipt of full particulars by the makers in England. By the second letter, Ex. 41, the time for delivery was fixed to be about the end of July 1923."

3. The third letter, Ex 127, varied the contract materially as to payment and is relied on by the plaintiffs as resulting in the property not passing It stated:

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We beg to confirm the following terms of payment, as agreed between us this afternoon namely:

Rs. 5,000 (say five thousand rupees) on signing this order.

Rs. 5,000 (say five thousand rupees) immediately we cable shipment. To wit say July 31, 1923.

Thence.

Rs. 3,000 (say three thousand rupees) on the last day of each month by post dated cheques on a recognised Bank.

All the sums paid by you in rupees will be finally converted in pounds sterling at the rate of exchange ruling on the date of each cheque. It is to be understood that the complete plant as supplied by us is to remain our property and to be completely covered by insurance by you until the final payment is made; and further that you are to expedite payments if at ail possible. The insurance policies and the premium receipts to be in our possession until the final payment is made. Kindly confirm this agreement and enclose your first instalment.

4. Stopping there, it is argued by Counsel for the respondents that, on the true construction of this contract the parties did not contract that the property in the goods was not to pass until full payment. In our opinion, that contention is wrong. We think that the words in this third letter mean what they say and that thereby the plaintiffs did stipulate that the property was not to pass until the whole of the contract price had been paid by the instalments therein mentioned.

5. Now this contract being made in India it is not disputed that the legal rights of the parties are governed by the Indian Contract Act so far as applicable, and in particular by Sections 77 and 83. Section 77 runs:

''Sale'' is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer

6. Section 78 deals with ascertained goods. It is clear that in the present case the goods were not ascertained. So I pass to Section 83 which deals with unascertained goods, viz.:

Where the goods are not ascertained at the time of making the agreement for sale but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete.

7. Section 83 has been complied with in the present case, for the plaintiffs constructed the boiler and the engine and despatched them to India and delivered them to the purchasers. We are told that the boiler was delivered for the shipment on July 19 and was actually delivered in India in September 1923, and that the engine was delivered for shipment in November 1923 and was

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delivered in India in December. In due course both the articles reached the purchasers'' premises. Subsequently, there was financial trouble. The purchasers went into liquidation, and rival claims were made to the engine and boiler by certain mortgagees and also by the liquidators of the purchasers representing the general body of creditors.

8. Thus we find that after the contract date goods answering the description in the contract were appropriated by the plaintiffs for the purpose of the contract and that that appropriation was assented to by the purchasers. Then, says Section 83, "the goods have been ascertained and the sale is complete." What then is the meaning of the words "the sale is complete"? For that we must refer again to Section 77 which tells us, that sale being the exchange of property for a price, it involves the transfer of the ownership of the thing sold from the seller to the buyer. Accordingly, if u/s 83 the sale is complete, then u/s 77 the ownership is transferred. And here I would respectfully adopt the suggestion of my brother Patkar that the words "exchange" and "price" in Section 77 should be read as meaning "exchange effected or promised for a price paid or promised." That, I think, is borne out by Section 78 which deals with the sale of ascertained goods.

9. Section 78 provides in effect that sale is effected by offer and acceptance of ascertained goods for a price or vice versa, together with either payment or part-payment of the price, or delivery or part delivery of the goods, or else with an agreement, express or implied, that the payment or delivery should be postponed. So stopping there, supposing one takes the third alternative, the property will pass without any physical exchange of the property, or any actual payment provided there is an agreement for payment or delivery or both being postponed. So, too, the property will pass on payment or delivery of the goods wholly or in part. And having regard to the third alternative in Section 78, it is no objection to the above construction of Section 83 that the latter may result in the property passing without either payment or delivery. My view, therefore, of Section 83 is that when it says the sale is complete," it means that a "sale" as defined by Section 77 has taken place and that incidentally the ownership of the thing sold has thereby been transferred from the seller to the buyer. This indeed is what the illustration to Section 83 shows.

10. So far as the construction of these particular sections goes, it has been difficult for Counsel for the appellants to contend that the above is not their prima facie meaning. But the appellants contend that all these clauses are subject to an implied but overriding condition, namely, provided that the intention of the parties is not to the opposite effect, or, in other words, that the contract does not otherwise provide. I , appreciate the attractiveness of that proposition. Modern thought and practice in the law Courts both in England and India have, I think, been all in favour of freedom of contract, and more especially so between mercantile men. It has been said over and over again that if mercantile men find it convenient to contract in a particular way as regards a particular commodity and there is nothing in public policy Or otherwise against it,

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then the Courts ought to do their best to assist the parties to carry out the intentions thus expressed. But, on the other hand, if the Legislature chooses to define what are the legal consequences of certain matters agreed between two parties, then speaking generally that intention has to be carried out by the Courts. And should it be found that that expressed intention of the Legislature operates harshly, then it is a matter for the Legislature itself to correct the mistake, if any, which is alleged to have been made.

11. Thus, in Brij Coomaree v. Salamander Fire Insurance Company 32 C. 816, the head-note runs:

If the parties to a contract for the sale of ascertained goods agree that the payment for and delivery of the goods are to be postponed, the property in the goods passes to the buyer as soon as the proposal for sale is accepted and such passing of property cannot be put off by any agreement between the parties.

12. There the Chief Justice (Sir Francis Maclean) says (page 823 Page of 32 C.--[Ed]):

But even if this view of the construction of the contract be not the true one, it seems to me the case is concluded by Section 78 of the Contract Act, which, says that, if the parties agree that the payment or delivery or both shall be postponed, the property passes as soon as the proposal for sale is accepted. Here both the payment and delivery were postponed and if so, it is difficult to see how in the face of that enactment, the property did not pass. It is said that, if we take this view, it will interfere with the freedom of contract between traders in this country. I do not think that it is so. If you find in a contract, such as that now under discussion, that the parties have agreed that the payment for, and delivery of, the goods are to be postponed, it is difficult to see why the consequence which, in such an event, the Legislature says, s. shall ensue is not to ensue. The parties enter into such a contract with their eyes open, and must be taken to know what the Legislature has laid down.

13. And later on he says (page 823 Page of 32 C.--[Ed.]):

But, if you find in a contract certain terms from which, when they exist, the Legislature says that certain consequences shall ensue, these consequences must ensue; otherwise, it is difficult to see what object there can be in codifying the law upon the question.

14. I quite appreciate that all the three Judges were of opinion on the facts of that case that in any event the property had passed to the buyer on March 31, 1903, which was the material date as being the date on which the fire took place, and that the other two Judges based their judgment on that fact and not on the point taken is the judgment of the Chief Justice which I have just read. But nevertheless the latter is a judgment of importance on which the learned trial Judge in the present case has very naturally relied in support of his own conclusion.

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15. This is supplemented by a recent decision of their Lordships of the Privy Council in Maneckji Pestonji Bharucha v. Wadilal Sarabhai & Co. 94 Ind. Cas. 824 : 53 I.A. 92 : 28 Bom. L.R. 777 : AIR 1926 P.C. 38 : 43 C.L.J. 508 : 24 A.L.J. 657 : 51 M.L.J. 1 : 50 B. 360 : (1926) M W.N. 489 : 30 C.W.N. 890. That was a case of a contract for the sale of shares. Unlike English Law, shares are "goods" for the purpose of the sale of goods sections in the Indian Contract Act, and accordingly their Lordships held that the contract was governed by the section already referred to. At page 98? Viscount Dunedin quotes Section 78, but adds that in the case before the Board the goods were not ascertained goods at the time of the contract, for the contract was only for so many shares of Alcocks,'' and not of any particular shares, Then Section 83 is quoted and the judgment proceeds (page 98 Page of 53 I.A. [Ed.]):

So soon, therefore, as Arajania, acting for Bharucha, handed Gora the certificates and transfers and Gora accepted them and gave the cheque, the goods became ascertained goods, the sale was complete and the property passed.

16. It was argued for the respondents that their Lordships here were relying on Section 78 for the passing of the property and not merely on Section 83 alone, but I am not satisfied that that was the fact. However, as one has to refer back to Section 77 to see what is meant by the expression "the sale is complete," one may also refer, as I have already done, to Section 78 as illustrating as how a sale is effected in the case of ascertained goods. On the other hand, as I read a. 78 it applies to goods which are ascertained at the date of the contract, and not to goods which are not ascertained until a later data

17. The judgment next proceeds to deal with the further point taken in that case, namely, that there was a stock exchange rule which, it was alleged, had the effect of making the delivery not actual but conditional, with the result that the property did not pass till the cheque was honoured. It states (page 99 Page of 53 I.A. [Ed.]):

Their Lordships consider this argument quite unsound. The Indian Contract Act settles that property is to pass on delivery. Delivery is a fact, and the statutory result must follow. Further, the rule cannot be read as an express stipulation in the sense of Section 121, because it does not say what Section 121 provides must be said. But in truth, in their Lordships'' view, the rule in question had nothing to do with the perfection of contracts or the passing of property. It is for quite another purpose.

18. As regards their Lordships'' view that the property passed on delivery, that would, I think, be because the appropriation and assent thereto would on the facts of that particular case be on delivery, for delivery would coincide with the assent to the appropriation u/s 83, viz., when the scrip was tendered to and accepted by the buyer, But even if the respondent''s view is correct that the Board were really relying on Section 78, yet it is equally clear that their

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Lordships held that the question as to the property passing must be determined by the provision of the Indian Contract Act which in that particular case had a certain statutory effect. There is not one word in that decision to show that underlying the Indian Contract Act there was in the opinion of the Board any such general exception of the intention of the parties to the contrary as is alleged by the appellants in the present case.

19. Moreover, it is noticeable that, there are clauses which go to show that where the Act intends that any particular provision is to be subject to any intention of the parties, it is expressly provided so. Thus as regards a vendor''s lien, Section 95 provides:

Unless a contrary intention appears by the contract, a seller has a lien on sold goods as long as they remain in his possession and the price or any part of it remains unpaid.

20. So, too, Section 121 runs:

When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract on the buyer''s failing to pay the price at the time fixed unless it was stipulated by the contract that he should be so entitled.

21. In saying this I appreciate the strength of the opening argument of the learned Advocate- General supplemented by that of his learned junior Mr. Banaji, who has today put the case for the appellant with clearness and force, namely, that prior to the Indian Contract Act of 1872, the law in India would follow that in England in subordinating everything to the intention of the parties. Moreover, by reason of the Indian Sale of Goods Act, 1930, which is to come into force on July 1, 1930, Chap. VII of the Act of 1872 dealing with sale of goods has been repealed, and in its place substantially the provisions of English Law have been substituted. And as regards this new Act no argument could arise, because it is framed in a totally different manner from the Act of 1872, and expressly provides that the rules for ascertaining whether the property passes in any particular case are to be subject to the intention of the parties. This applies to ascertained goods as well as to unascertained goods as will be seen on reading Sections 19 to 23 of the Act.

22. So, too, if one turns to the English Sale of Goods Act, Section 18, one finds that though the paramount question is the intention of the parties, yet under certain rules laid down for discovering that intention the property in unascertained goods passes to the buyer when the goods are appropriated to the contract with the assent of the buyer, unless a different intention appears. So that provision illustrates that, there is nothing against mercantile usage in construing Section 83 of the Indian Act in the way I have, because the same rule exists in England with this difference that English Law allows the exception of the parties making a bargain to the contrary.

23. It is also pointed out by the appellants that under English Law there is

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nothing against public policy in allowing parties to enjoy this freedom of contract. Thus in McEntire v. Crossley Brothers (1895) Article 6, 457, Lord Herschell. L.C. says (page 463 Page of (1895) A.C.--[Ed.]):

If that was really the intention of the parties, I know of no rule or principle of law which prevents its being given effect to.

24. Lord Ashbourne says (page 468 Page of (1895) A.C.--[Ed.]):

I can see no considerations of public policy, and no considerations of inconvenience in the administration of bankruptcy law in Ireland, or elsewhere, that should induce us to specially favour the arguments addressed to us on the part of the appellants here.

25. There were several other cases referred to in the course of the arguments before us. There was the decision of Mr. Justice Pratt in Herbert John Amies v. Jal P. Virji 77 Ind. Cas. 150 : 25 Bom. L.R. 778 : AIR 1924 Bom. 41, where he disagreed with what was stated by Sir Francis Maclean in Brij Coomaree v. Salamander Fire Insurance Company 32 C. 816, and thought that the provisions of the Indian Contract Act must give way to the express intention of the parties. This view is supported to some degree by the decision of Mr. Justice Mulla in Ford Automobiles v. Delhi Motor Co., 70 Ind. Cas. 138 : 24 Bom. L.R. 1140 : AIR 1923 Bom. 125, although there the learned Judge''s view was that on the facts of that case there had not been a final appropriation by the vendor of the goods to the contract, and, therefore, in any event, the property had not passed. Reference was also made to a decision of my own in A. Cecil Coole v. Nanalal Moraji Dave 92 Ind. Cas. 191 : 26 Bom. L.R. 880 : 49 B. 172 : AIR 1925 Bom. 18 which depended on the construction of a singularly badly drawn document which purported to be a hire purchase agreement, I held that it was an agreement for sale and not merely for hire with an option to purchase, and that on the construction of that document the parties had not stipulated that the property should not pass and that accordingly the matter was regulated, the goods being ascertained goods, fay Section 78. We were also referred to the decision in Baijnath Prasad Singh and Another Vs. The Firm of Nand Ram Das and Another, , where the Division Bench of the Patna High Court was of opinion that the law was well settled that in such a case the property did not pass. With all respect, I think, it is impossible to hold, at any rate in this Presidency, that the law on the point is well settled. I only wish it was, because if so we should have spared the hearing of this difficult case.

26. We were also referred to Abdul Aziz Bepari v. Jogendra Krishna Roy 36 Ind. Cas. 119 : 44 C. 98 : 20 C.W.N. 1224, but in that case the Court found that the alleges contract was not proved, and it, accordingly decided the case on what was the local usage. But, as pointed out by Counsel for the respondents before us, the provisions on the Indian Contract Act do not affect any usage or custom of trade: see Section 1.

27 Mohori Bibi v. Dhurmodass Ghose 30 I.A. 114 : 5 Bom. L.R. 421, Ramdas

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Vithaldas Durbar v. S. Amerchand & Co. 35 Ind. Cas. 954 : 43 I.A. 164 : 20 C.W.N. 1182 : (1916) 2 M.W.N. 110 : 18 Bom. L.R. 670 : 20 M.L.T. 194 : 31 M.L.J. 541 : 4 L.W. 342 : 14 A.L.J. 1045 : 85 L.J.P.C. 214 : 24 C.L.J. 320 : 40 B. 630 : 32 T.L.R. 594 and Hanasraj v. Bejoy Lal Seal 122 Ind. Cas. 20 : 57 I.A. 110 : 32 Bom. L.R. 550 : (1930) A.L.J. 131 : Ind. Rul. (1930) P.C. 100 : 31 L.W. 309 : 34 C.W.N. 342 : 32 Bom. L.R. 550 : 51 C.L.J. 120 : 58 M.L.J. 293 : (1930) M.W.N. 334 were cited to show that their Lordships of the Privy Council have always taken the view that if in India the legislative provisions are clear, we are bound by them and are not to be affected by the question whether or no they coincide with the law for the time being in England.

28. We were also referred to the authorities which show that the Indian Contract Act, 1872, is not a complete Code, and that if there is a clear omission in the Act to provide for a particular matter one may refer to the law prevailing before the Act and in general apply English Law on the point. The recent case from this Court, Jwaladutt Pillani v. Raja Bahadir Bansilal-Motilal(l2) illustrates that contention very well. It was a partnership case in which, confirming the decision of this Appellate Court, the Privy Council held that the particular point was not precisely covered by an appropriate section of the Indian Contract Act, and that, therefore, the English Law on the point prevailed.

29. If in the present case I could come to the conclusion that there was any casus omissus, I might well arrive at a similar finding to that in Jwaladutt Pillani''s case 115 Ind. Cas. 707 : 31 Bom. L.R. 687 : AIR 1929 P.C. 132 : lad. Rul. (1929) P.C. 123 : 33 C.W.N. 585 : 49 C.L.J. 485 : 53 B. 414 : (1929) A.L.J. 579 : 29 L.W. 884 : 56 M.L.J. 739 : (1929) M.W.W. 440 : 56 I.A. 174 , and apply English law. But as I read Section 83, and apply it to the facts of this particular case, I do not see that there is any lacuna left. In other words, we have an express section applying to the facts of this particular case. And I see no other section in the Act which in the events which have happened permits us to modify the operation of Section 83.

30. So I find myself in substantial agreement with a still later case of Bhimji v. Bombay Trust Corporation Ltd. 124 Ind. Gas. 800 : 32 Bom. L.R. 64; Ind. Rul. (1930) Bom. 304; AIR 1930 Bom. 306 : 54 B, 381, decided by Mr. Justice Wadia, where he held on the facts of the case before him that u/s 78 of the Indian Contract Act the property in the car passed to the plaintiff as soon as the proposal for sale was accepted, and that such passing of the property could not be postponed by any agreement between the parties.

31. Lastly, I would like to add a word of respectful appreciation of the industry and care which the learned Subordinate Judge has shown in dealing with the numerous points of fact before him and this difficult and important question of law. Its importance, however, is not now so great as it would have been but for the new Act which will presently be in operation, and, therefore, as regards future contracts if there is any such hardship as is alleged by the appellants, it will be obviated after the new Act comes into operation.

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32. In my judgment the conclusion which the learned Judge arrived at on this part of the case is correct, and accordingly this appeals must fail.

33. Under these circumstances, it is unnecessary for us to go into the other points in the case on which the respondents rely against the appellants. I am aware of the convenience of an Appellate Court deciding all matters in dispute when a case comes up in appeal, but having regard to the wholly insufficient number of Judges to do the increasing work of this Court, it is impracticable for the Court to go into any questions which are not absolutely necessary for the disposal of an appeal.

34. As regards the. costs of the appeal, we think the appellant must pay the costs. We think there must be three sets of costs, namely, one for respondents Nos. 1 and 2, the liquidators of the Company; another set payable to respondents Nos. 4, 5, 7, 8 and 9, the receivers and the representatives of the deceased mortgagee; and a third set of costs for respondent No. 6, the purchaser at the auction-sale. They all had separate interests and we cannot see how they could fairly be required to appear by the same Pleader.

35. Then as regards the cross-objections of defendant No. 6 against the order of the learned Judge making no order as to costs, we are not prepared to disturb that order. There were a large number of points raised in the trial Court all of which were decided in favour of the present appellants including the point raised by defendant No. 6 that he was a bona fide purchaser for . value without notice. That point was found against defendant No. 6 by the trial Judge, though it may be that it was his co defendants who raised the other defences. We think that the learned Judge''s order was a fair one in the special circumstances of this case. Consequently, the cross-objections will be dismissed with costs.

Patkar, J.

36. I agree and have nothing to add.

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