

(1927) 01 BOM CK 0009
In the Bombay High Court
Case No : Second Appeal No. 965 of 1925

Shriram Vithuram

APPELLANT

Vs

Trimbak Amolakchand

RESPONDENT

Date of Decision : 24-01-1927

Acts Referred:

Contract Act, 1872 — Section 78

Citation : AIR 1927 Bom 514 : (1927) 29 BOMLR 1036 : 103 Ind. Cas. 645

Hon'ble Judges : Baker, J; Amberson Marten, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Amberson Marten, C.J.—On April 20, 1921, defendant No. 1 entered into a contract at Jalgaon with the plaintiff by which he sold 440 tins of groundnut oil at Rs. 7-4-0 per tin deliverable at Salem by the agent of the defendant. The terms of payment were that Rs. 7-1-0 were to be paid to the defendant's agent as Salem, less Rs. 500 already paid by the defendant to that agent, and that the remaining 3 annas plus Rs. 500 were to be paid to the defendant at Jalgaon. This contract was an oral one, but on the same day the defendant handed to the plaintiff a delivery order, Exhibit 15, on the defendant's agent at Salem. In fact the goods were not in the custody of the agent on that date, as they had already been delivered by him to the railway company for transit to Jalgaon. This was in accordance with his instructions, and it is not suggested that he committed any breach of duty to his own principal in so doing. On the other hand neither party knew at the date of the contract that the goods had in fact been so delivered. The importance of the delivery to the railway is that at that date waggons were difficult to obtain, and consequently oil in transit on the railway had a far higher value than oil at Salem.

2. On April 22 the plaintiff heard by wire from Salem that the goods were on rail, and he thereupon required the defendant to hand over the railway receipts, and expressed his willingness to pay the purchase price. He followed this up by the

notice of that date, Exhibit 16, but the defendant refused to hand over the railway receipts or the goods, and on the other hand when the goods eventually arrived at Jalgaon in July he sold them at a large profit.

3. Both the Courts below have held in favour of the plaintiff on the ground that the property in the goods passed to the plaintiff, that there was a wrongful conversion, and that the damages should be assessed not on the date of conversion or on the date of the breach of contract, but on the date when the goods arrived at Jalgaon.

4. The first point taken by the appellant is that there was here a common mistake between the parties in thinking that the goods were at Salem, whereas in fact they were on the railway, and but for that mistake neither party would have entered into the contract. That contention has been overruled in the Court below and we think rightly so. In our judgment this is not a case where it can be said that the parties contracted under a common mistake which would entitle one of them to set aside the contract.

5. Next passing to the point as to whether the property in the goods passed, it will be seen that payment was to be made partly in Salem against the delivery of the goods, and partly at Jalgaon afterwards. I do not think it can be said that a contemporaneous payment was contemplated by the parties, even allowing for the wire from the defendant's agent, which is referred to in the delivery order Exhibit 15, and which the agent was to send when the amount payable at Salem had been paid. Consequently, it seems to me that there was a postponement of at any rate a part of the purchase price. Under these circumstances I would hold that u/s 78 of the Indian Contract Act the parties agreed by implication that the payment was to be postponed. It may be that the whole payment was not to be postponed, but as a substantial part of it was to be postponed, it follows that the payment of the entirety was postponed.

6. Under those circumstances it is unnecessary to consider whether the mere fact that in the ordinary course delivery and payment could not be made at Salem for some appreciable time after the actual execution of the contract at Jalgaon, would of itself be a postponement of payment or delivery within the meaning of Section 78. On the other hand I would hold that in the present case the handing over of the delivery order on the defendant's agent at Salem would not amount to a delivery of the goods seeing that in fact the agent at that time had not got the goods with him, and of course there was no assent by the agent to that delivery order.

7. The property in the goods in my judgment having thus passed to the purchaser, the question arises as to the measure of damages. Now it is clear that in the ordinary case between a vendor and a purchaser of goods, the measure of damages is the difference between the contract price and the market price at the date of breach. (See *Jamal v. Moolla Dawood, Sons & Co.* (1915) L.R. 43 IndAp 6 18 Bom. L.R. 315 and *Williams Brothers v. Ed. T. Agius, Limited* [1914] A.C. 510

In so far therefore as this suit rests on contract, the date for determining the damages would be the date of breach, viz., April 22, as found by the lower appellate Court. If the plaint be read, it will be found that the suit is based on contract. In both the lower Courts, however, the plaintiff has been allowed to raise an alternative case of conversion. Let that be so. Assuming that there was a conversion, what would be the proper date on which to assess the damages? In my judgment the same date must be taken, viz., the date of conversion which was April 22. As pointed out in *Chinery v. Viall* (1860) 29 L.J. Ex. 180 the principle deducible from the authorities is that a man cannot, by merely changing his form of action, vary the amount of damages so as to recover more than the amount to which he is really in law entitled according to the true facts of the case and the real nature of the transaction. Accordingly in that case it was held that a purchaser of sheep to whom the property had passed could only recover the value of the sheep less the price he would have paid. The case of *Reid v. Fairbanks* (1853) 13 C.B. 692 was cited in the judgment as showing that where a ship, unfinished, was taken, completed, and then converted, the plaintiff was entitled to the value at the time when the defendant took it, not at the time when he converted the completed ship to his own use.

8. No doubt the lower appellate Court has relied on *Greening v. Wilkinson* (1825) 1 C. & P. 625 and on a passage in *Mayne on Damages*. But in the present case the date of the arrival of the goods at Jalgaon seems a very arbitrary date to take. I see no particular reason why that date should be taken any more than some date in May or June, or even possibly the trial of the action, or the date of judgment, if once you are to depart from the well-recognised rule that the date of breach is normally the date on which you should ascertain the damages. In this particular case, I think, it would be quite wrong to say that if a plaintiff framed his suit on a breach of contract as he did here, he could recover X Rs. but if he added an alternative prayer for conversion founded on exactly the same facts, he could multiply his claim by a large factor.

9. In my judgment, therefore, damages on the alternative claim of conversion should in the present case be taken as on April 22. That being so, it is clear that no damages in fact have been sustained by the plaintiff. He has given no evidence that the market value of the goods on April 22 was any higher than the market rate two days before, when the contract was entered into. Consequently he has failed to prove any damages, and in my judgment this suit must fail.

10. And when one looks beneath the surface, it will be found that this result is not inequitable. The plaintiff has so far paid nothing for these goods, and he has really wished to take advantage of the accident that prior to the contract the goods were on rail, and so worth a far higher sum on arrival at Jalgaon. But that, he never contracted for. All he contracted for were goods at Salem and he took the chance that he might afterwards be able to get railway waggons to send them to Jalgaon or elsewhere. So it would be in the nature of windfall for him, if he was given damages based on the view that he was entitled to the railway

receipts for goods on rail, for which in fact he had never contracted.

11. Under these circumstances I would hold that this appeal must be allowed, and that the suit must be dismissed with costs throughout.

Baker, J.

12. I agree.