

(1922) 08 BOM CK 0008
In the Bombay High Court
Case No : O.C.J. Suit No. 2943 of 1920

The Ford Automobiles India Ltd.

APPELLANT

Vs

The Delhi Motor and Engineering Co.

RESPONDENT

Date of Decision : 14-08-1922

Acts Referred:

Contract Act, 1872 — Section 83, 91

Citation : AIR 1923 Bom 125 : (1922) 24 BOMLR 1140

Hon'ble Judges : Mulla, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Mulla, J.—This is a suit to recover Rs. 43,125 being the price and other charges of twenty motor cars consigned by plaintiffs from Bombay to the defendants at Amballa under a contract between the parties and destroyed by fire in transit.

2. Prior to 1920 there was a firm, named Ford Automobiles, which carried on business in Bombay in Ford cars and accessories. The plaintiffs were registered as a limited company early in 1920 and they purchased the business of the said firm. The plaintiff company is now under liquidation and the present suit is brought by the liquidator of the company in the company's name.

3. The defendants carry on business as commission agents at Delhi. It seems that there were some dealings between the defendants and the said firm prior to 1920. In March 1920 the plaintiffs employed the defendants as their commission agents for the sale of Ford motors in Delhi and other places. The terms of the agency contract were arranged between the plaintiff's representative and the defendants' representatives, Dolatram and Sons. On March 1, 1920, the plaintiffs wrote to Dolatram and Sons as follows :-

In connection with the personal visit of the undersigned a few days ago we have much pleasure in informing you that we have decided to give you the Ford sub-agency on the usual terms as laid out in our Ford, Sub-Agents' contract (which is

at present in the hands of our printers) and which will be forwarded to you for signature as soon as ready. Under the new contract discount on cars is as follows irrespective of the number of oars taken :-

Rs. 300 per car on assembled oars.

RS. 350 per car for unassembled cars.

We understand you are prepared to contract for 150 cars per year.

4. Counsel for the plaintiffs stated in his opening that some of the terms of the said agency contract were contained in a printed form referred to in the above letter. He produced the printed terms, and when asked whether those terms were shown to the defendants and accepted by them at the interview referred to in the said letter he said that the terms were then under print, but that the plaintiffs' representative had shown to the defendants another printed form which contained similar terms. He said that the plaintiffs had not got a copy of that form, and after some discussion he gave up the contention that the printed terms referred to in the said letter formed part of the contract especially as they were not signed by the defendants.

5. On March 2, the plaintiffs sent a telegram to the defendants stating "sending you earliest possible date goods train twenty unassembled cars. Please wire if you do not require." After some correspondence the defendants agreed to accept twenty cars to be sent to them by the plaintiffs by goods train. On March 10, the plaintiffs wrote to the defendants inquiring how they should draw on the defendants for payment of the said cars against delivery. The defendants replied, on March 15, asking the plaintiffs to send the railway receipt through the Delhi. Branch of Messrs. King, King & Co.

6. On March 27, the plaintiffs delivered twenty cars to the B.B. and C.I. Railway in Bombay for carriage to Amballa and obtained a railway receipt (Ex. A) for the same. The railway receipt was made out in the name of the plaintiffs as consignees and endorsed by them in blank (see plaint, para 4). The cars were delivered to the railway company under a special contract a6 owner's risk. The risk note is not produced, but it was admitted by Mr. Lilley, a witness for the plaintiffs, that the cars were conveyed at owner's risk. It appears from Ex. No. 1 that the risk note was in Form B.

7. The plaintiffs advised the defendants of the despatch of the cars, and they sent a bill to the defendants for Rs. 44,700 for the twenty cars, and wrote to the defendants on March 27, asking them to take delivery of the railway receipt from Messrs. King, King & Co. at Delhi, on payment to them of the said amount. At the same time the plaintiffs sent the railway receipt to Messrs. King, King & Co. at Delhi with instructions to them to deliver the railway receipt to the defendants on payment of the said amount. It was subsequently found that Rs. 44,700 was a mistake for Rs. 42,700, and the plaintiffs instructed Messrs. King, King & Co. to accept payment of Rs. 42,700 instead of Rs. 44,700. It seems that thereafter the

cars were burnt in transit between Ravanj Doonger and Siwai Madhopur stations on that railway. On April 17, the defendants sent a telegram to the plaintiffs stating that all the twenty cars were missing. By their letters of April 17, April 29, and May 4, the defendants requested the plaintiffs to make a claim against the railway company and they complained that the non-delivery of the cars had caused them much prejudice as they were unable to deliver the cars to their customers. On May 7, the plaintiffs wrote to the defendants that they had already instituted enquiries to trace the whereabouts of the cars. In the meantime it seems that Messrs. King, King & Co. demanded payment from the defendants, but the defendants refused to pay. On May 28, the plaintiffs wrote to the defendants stating that the said cars were burnt in transit, and that as the terms of payment were f. o. r. (free on rail), Bombay, the salvage was lying at the Siwai Madhopur Station at the disposal of the defendants. By that letter the plaintiffs demanded immediate payment of Rs. 42,700 from the defendants. Pausing here for a moment it may be observed that the cars were not consigned on f. o. r. terms at all. There is no reference to these terms anywhere in the plaint or correspondence, nor did the plaintiffs contend at the hearing that the cars were consigned on those terms. The plaintiffs were under an entire misapprehension when they wrote stating that the consignment was on f. o. r. terms. The position taken up by them in the plaint is quite different as will be seen presently.

8. On May 29, Messrs. King, King & Co. wrote to the plaintiffs stating that the defendants had refused payment and they asked for further instructions. On June 21, the plaintiffs through their attorneys wrote another letter to the defendants in which they took up a similar position to that in their letter of May 28.

9. No evidence was given at the hearing as to whether the plaintiffs made any claim against the railway company. It was, however, admitted on behalf of the plaintiffs that having regard to the risk note, the railway company was not liable for loss of the cars. It was also admitted that the cars were not insured.

10. The defendants refused to pay and the plaintiffs brought the present suit on October 19, 1920. Paragraph 3 of the plaint sets out the terms of the contract as understood by the plaintiffs. There is not a word about f. o. r. terms in that paragraph. The only ground on which the plaintiffs seek to hold the defendants liable for the price is that contained in para 6 of the plaint, namely, that the delivery to the railway was equivalent to delivery to the defendants. The case came on for hearing on July 31, 1922, when the plaintiffs applied for leave to amend the plaint by adding a further ground of claim, namely, that the plaintiffs had appropriated the twenty cars to the contract, and that the defendants had assented to the appropriation, and that the property in the cars had therefore passed to the defendants. Leave was granted to the plaintiffs to amend the plaint and the hearing of the suit was adjourned. The plaint has since then been amended and the amendment is set out in para 5 A of the plaint. The defendants filed their written statement denying that the terms of the contract were as stated in para 3 of the plaint. They also denied that the property in the goods

had passed to them. They alleged that the consignment having been made at owner's risk, they were not liable for the price of the cars.

11. It is common ground that the contract is contained in the correspondence set out above, and the first question to determine is what were the terms of the contract as regards the said consignment. A careful perusal of the correspondence shows, that the defendants ordered the twenty cars from the plaintiffs upon terms that the plaintiffs should send the same by rail and that the defendants should pay for them to Messrs. King, King & Co. at Delhi against the railway receipt. It also shows that Messrs. King, King & Co. at Delhi were the plaintiffs' agents to receive payment of the price from the defendants, and to deliver the railway receipt to them on payment. The railway receipt was made out by the plaintiffs in their name as consignees and endorsed by them in blank. The cars were consigned at owner's risk with the result that the railway could not be held liable for the loss thereof.

12. The only witness called by the plaintiffs was Mr. Lellie. He was called to prove, first, that, according to the usage of the trade in India, motor cars from one place of India to another were sent at owner's risk and not at railway risk and that the defendants had knowledge of the usage; and, secondly, that on previous occasions when the defendants had ordered cars from the said firm of Ford Automobiles the said firm had sent them to the defendants at owner's risk and the defendants had paid for and taken delivery thereof, and it was therefore an implied term of the contract between the plaintiffs and the defendants that the cars should be consigned at owner's risk. As there was not a word about the alleged usage and the implied contract in the plaint, nay, not even a word about the consignment having been made at owner's risk, I disallowed all questions relating thereto. I must, therefore, decide the case on the footing that the plaintiffs delivered the cars to the railway at owner's risk without the consent express or implied of the defendants.

13. It was argued for the plaintiffs that the property in the cars passed to the defendants u/s 83 of the Indian Contract Act, and that the defendants were, therefore, liable for the price. It was also argued that delivery to the railway had the same effect as delivery to the defendants and that the defendants were, therefore; liable to pay the price u/s 91 of the Act, By Section 83 it is provided that "where the goods are not ascertained at the time of making the agreement for sale but the goods answering the description in the agreement are subsequently appropriated by one party for the purposes of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete." The commonest form of appropriating goods to a contract for the sale of unascertained goods is by delivering them to a carrier.⁽¹⁾ A very common mode of doing business is for one merchant to give an order to another to send him certain goods. Here it becomes the seller's duty to appropriate the goods to the contract. The seller is by the express or implied terms of the contract authorised to select and appropriate the goods, the buyer

having given a previous implied assent to the seller's appropriating. The difficulty in such cases is to determine what constitutes the appropriation.(2) The question in all these cases is one of intention but there are some well-established rules, especially those laid down in *Wait v. Baker* (1848) 2 Ex. 1 and *Mirabita v. Imperial Ottoman Bank* (1878) 3 Ex. D. 164 which are constantly referred to by the Courts of England as affording a guide in cases of this kind. Those rules may be stated thus:-

(1) In the case of such a contract (i.e., a contract for the sale of unascertained goods), the delivery by the vendor to a common carrier, or, unless the effect of the shipment is restricted by the terms of the bill of lading, shipment on board a ship of, or chartered for, the purchaser is an appropriation sufficient to pass the property : *Mirabita's case*, at p. 172.

(2) If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent, or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser : *Mirabita's case*, at p. 172.

[The bill of lading in *Mirabita's case* was made out to the shippers' order. The second rule laid down above deals with the class of cases where the bill of lading is made out to the order of the shipper.]

(3) If the vendor deals with, or claims to retain, the bill of lading, in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance or payment or tender, the property in the goods does not pass to the purchaser : *Mirabita's case*, at p. 172.

[Rule (3) does not deal with bills of lading made out to the shippers' order: see *The Annie Johnson* [1918] P. 154]

(4) If the seller discounts a draft upon the buyer with a bank, and authorises the bank to hand to the buyer a bill of lading to the order of the seller and endorsed in blank by him upon his acceptance of the draft, the intention to be inferred, according to general mercantile understanding, is that the seller intends to transfer the ownership when the draft is accepted, but intends also to remain the owner until this has been done : *The Prinz Adalbert* [1917] A.C. 586.

14. Turning now to Section 83, the question arises whether the section applies to cases where the seller is authorised to make the appropriation and the buyer has given a previous implied assent to the appropriation. I think the words "and that the appropriation is assented to by the buyer" are wide enough to cover this

class of cases.

15. As to delivery to a carrier and its effect it is provided by Section 91 of the Act that "a delivery to a wharfinger or carrier of goods sold has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of the goods which do not reach him, unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods." But the section does not provide for cases where the seller delivers the goods to a carrier and reserves the right of disposal. The Act being silent on this point, it is competent to the Courts of British India to resort to the rules of English common law so far as they are not inconsistent with the text of the Contract Act, One of those rules is that where in pursuance of the contract, the seller delivers the goods to a carrier, for the purpose of transmission to the buyer, but retains a *jus disponendi* until certain conditions are fulfilled, the property in the goods does not pass to the buyer until the conditions imposed by him are fulfilled. This rule applies not only to delivery of goods to carriers by sea (see *Mirabita's* case cited above), but to delivery to carriers by land (*Dutton v. Solomonson* 1803) 3 B. & P. 582 and to canal-boat companies (*Fragano v. Long* (1825) 4 B. & C. 219; *Bryanas v. Nix* (1839) 4 M. & W. 775. It was faintly contended for the plaintiffs that the rule contained in the first part of Section 91 was absolute and inflexible, and that it applied to all cases and in all circumstances. If this were so, no seller could reserve a right of disposal of the goods while they are in transit-a result repugnant to common sense and opposed to general mercantile understanding.

16. The sole question as stated above is one of intention. It is intention that is the determining and decisive factor in these cases (*The Annie Johnson*; *The Konprinsessan Margareta* [1918] P. 154 and that is a question of fact (*The Prinz Adalbert* [1917] A.C. 586 In the present case, after the terms of the agency contract were settled between the parties, the plaintiffs offered to send twenty cars to the defendants by goods train. The defendants agreed to accept twenty cars to be sent to them by goods train. The plaintiffs delivered twenty cars to the B.B. & C.I. Railway Company in Bombay for carriage to Amballa. The railway receipt was made out by the plaintiffs in their own name as consignees and it was endorsed by them in blank. The receipt was sent by the plaintiffs to their agents Messrs. King, King & Co. at Delhi with instructions to them to hand it over to the defendants on payment of Rs. 42,700. Until payment the receipt was not to be delivered by Messrs, King, King & Co. to the defendants. I will assume that Section 83 of the Contract Act does not apply to the present case. The question is, what was the intention of the parties ? Was it the plaintiffs' intention to retain the ownership of the goods until the price was paid, or was it their intention to transfer the ownership to the defendants immediately on delivery of the cars to the railway company ? I am inclined to think that the plaintiffs' intention was to retain the ownership of the goods until the defendants paid the price (see *Ram Lal v. Bholu Nath* ILR (1920) All. 619. If Section 83 of the Indian Contract Act applies to the case, it appears to me that the plaintiffs having instructed their

agents not to deliver the railway receipt till payment, the appropriation was not absolute and final, but conditional on payment by the defendants, and that there was therefore no "appropriation" within the meaning of that section. I, therefore, hold that the property in the cars did not pass to the defendants on delivery to the railway company and that the defendants are not liable for the price.

17. It was contended for the plaintiffs that the principles of the English decisions referred to above applied only to bills of lading and they did not apply to railway receipts. I do not think there is any force in this contention. It is true that a railway receipt is not a symbol of goods in the sense in which a bill of lading is, but where, as in the present case, a railway receipt can be transferred by endorsement so as to entitle the holder thereof to transfer the goods thereby represented (see condition 3 endorsed on the receipt), the distinction between the two is a thin one as appears from the observations of the Privy Council in *Ramdas Vithaldas v. Amerchand & Co.* (1916) L.R. 43 IndAp 164 ; ILR 40 Bom. 630 In *In re Wiltshire Iron Co., Ex parte Pearson* (1868) 3 Ch. App. 443 which was a case of delivery of goods to a railway, the Court of Appeal in Chancery applied the principle of the decision in *Wait v. Buker* referred to above where the delivery was to a shipping company.

18. I now turn to the contention of the defendants that even if delivery of the cars to the railway was tantamount to delivery to the defendants, the defendants were not liable for the price inasmuch as the plaintiffs consigned the cars at owner's risk as distinguished from railway risk, with the result that the defendants could not hold the railway liable for the loss thereof. I think this contention must prevail. *Clarke v. Hutchins* (1811) 14 East 475 was a similar case. In that case the seller in delivering the goods to a trading vessel neglected to inform the carriers that the value of the goods exceeded ₹ 5 although the carriers had published that they would not be answerable for any package, above that amount unless entered and paid for as such. The package was lost, and the seller sued the buyer for the price. It was held that the buyer was not responsible for the price as the seller had not put the goods into such a course of conveyance as that in case of a loss the buyer might have his indemnity against the carriers. I, therefore, hold that the defendants are not liable for the price u/s 91 of the Indian Contract Act.

19. The suit is dismissed with costs.

(1) *Bee Chalmers' Sale of Goods*, 8th Edn., p. 59. (2) See *Benjamin on Sale*, 6th Edn., p. 384.