

(1924) 03 BOM CK 0005
In the Bombay High Court
Case No : First Appeal No. 11 of 1921

The Narsinggirji Manufacturing Company	APPELLANT
Vs	
Budansaheb Abdulsahab Kaji	RESPONDENT

Date of Decision : 06-03-1924

Acts Referred:

Evidence Act, 1872 — Section 91

Citation : (1924) 26 BOMLR 523

Hon'ble Judges : Shah, J; Norman Macleod, J

Bench : Division Bench

Judgement

Norman Macleod, Kt., C.J.—The plaintiff Company, hereafter called the plaintiff, sued to recover Rs. 83,818-9-9 by way of damages for breach of contract. There were various contracts entered into between the plaintiff and the defendant from July 3, 1918, to September 1, 1918, for the purchase of saris, yarn, and dhotis. The delivery was to be taken on or about December 31, 1918.

2. The plaintiff alleged that the defendant did not take delivery of all the goods within the stipulated period. He took delivery of only forty bales as described in para 2 of the plaint at the rates of Rs. 16-14-0 per piece. The plaintiff then informed the defendant by a notice of December 31, 1918, that he should take delivery of the goods after paying their price, and it was stated therein that the goods would be sold by public auction if delivery was not taken. After the notice, the defendant requested the plaintiff to extend the time up to the end of March, and the plaintiff agreed to do so on deposit of Rs. 7,500 in case any damages were sustained. Accordingly the plaintiff alleged that the time was extended up to March 31, and thereafter the defendant took delivery of certain goods but refused to take delivery of the remainder in spite of the notice sent on March 22. The goods were sold by the plaintiff on April 3, and the plaintiff claimed that the Company was entitled to recover from the defendant the difference between the sale price and the contract price after giving credit to the defendant for Rs. 7,500.

3. The defendant admitted the agreement sued upon but contended that he

could not take delivery of the goods as they were not in stock, and that the deposit of Rs. 7,500 was made for the purpose of deriving interest and had no connection with the transactions in suit.

4. The following issues were raised:--

(1) Whether the plaintiff was not ready and able to give delivery of goods as per agreement to the defendant?

(2) Was the time extended up to the end of March 1919 as alleged?

(3) Was parol evidence admissible to prove the extension of time having regard to Section 91 of the Evidence Act.

(4) If time was extended, what was the amount of damages?

(5) If the time was not extended, what damages were proved?

(6) What decree should be passed?

5. The Judge held that the time was not extended up to the end of March 1919, as alleged, considered it unnecessary to find on issues Nos. 4 and 5, and dismissed the suit on the authority of the decision in *Angullia & Co. v. Sassoon & Co* ILR (1912) Cal. 568, where it was decided that inasmuch as the claim for damages was based on a re-sale, in the circumstances of the case no decree could be made for damages on the basis of the difference between the contract and market rates. The Judge said:--

It is finally to be reconsidered whether the damages cannot be awarded to the plaintiff on the assumption that there is a breach of contract which entitles him to claim damages u/s 73. Having regard to the principle laid down in 24 and 39 Cal, I think that this cannot be done. It is quite clear that until the plaint is amended in the way suggested in those rulings the relief sought is unawardable.

6. Later on at page 5 the Judge says:--

There is no amendment in the plaint. It is worthy of remark that the prices were going down after the contracts were entered into. The defendant there fore must be unprepared to meet a case not at all disclosed in the pleadings. In fact we have not before us defendant's answer to the case which was never propounded but on the strength of which I am called upon to award a decree merely because there is an issue as to the genesis of which enough has already been said. Particularly there is no reason to sympathise with the plaintiff because it is unreasonable obstinacy which was probably responsible for the refusal to amend the plaint though the objection was stoutly urged on behalf of the defendant. It is, I concede, otherwise, if the plaintiff disagrees with the view which I had taken, but it is a little short of folly to take this risk and pin their whole faith upon a fact that an issue has been raised.

7. Now this is a perfectly simple case of a claim for relief on the ground that the defendant has broken his contract by not taking delivery of the goods ordered by

him. Clearly the property in the goods did not pass to the purchaser, and if the purchaser failed to take delivery on the due date, then the ordinary rule would apply and the measure of damages would be the difference between the contract rate and the market rate at the date of the breach. The contract provided that if the purchaser failed to take delivery of the goods, the vendor should sell the goods to another. In spite of this provision, and although the Judge rightly found that the property in the goods had not passed to the purchaser, by some curious process of reasoning he came to the conclusion that the plaintiff had not an uncontrolled power of sale. As a matter of fact the provision in the contract with regard to the vendor's power to sell the goods was unnecessary, and the failure to recognise this has caused one of the errors in the judgment under appeal. In the next place, the fact that the plaintiff claimed as the measure of damages the difference between the price, which he realised on the re-sale of goods and the contract price, would, in my opinion, be no reason for the Court to refuse to award damages according to the correct measure. With all due respect to the Judges who decided *Angullia and Co. v. Sassoon and Co.*, it seems to us that it is going too far to hold that when a plaintiff has made a mistake in demanding damages on a wrong basis, the Court must refuse to set right the mistake by directing the damages to be calculated in the proper way unless the plaint is amended. In 1919 when hundreds of suits were being filed for breach of contract in this Court, I tried many cases in which damages were claimed on the basis of the prices realised by the sale of the goods of which the purchasers had failed to take delivery, but it was never considered that this was a defect which was fatal to the suit unless the plaint was amended. It was at once conceded that the prices so realised could only be evidence of the market price at the time of the sale, which might or might not be relevant on the question of the market price at the date of the breach. I think, therefore, that the suit was wrongly dismissed.

8. The plaintiff had a good claim unless the Court could come to the conclusion on the first issue that the plaintiff was not ready and able to give delivery of the contract goods on the due date. We must set aside the order dismissing the suit and remand the case to be retired in the Court below on the following issues:--

(1) Was the plaintiff ready and willing to give delivery of the contract goods according to the terms of the contract to the defendant?

(2) If the breach of contract was by the defendant and not by the plaintiff, what was the market price of the goods on December 31, 1919?

9. The Court below has found that the contract time was not extended. If the defendant committed the breach the plaintiff will be entitled to the difference between the contract rate and the market rate as found. The item of Rs. 7,500 must be included as having been paid by the defendant under the contract, and consequently the plaintiff must give him credit for that amount.

10. The defendant did not go into the witness-box to support his story that there was a separate deposit at interest and it would not be fair to the plaintiff to allow

any fresh evidence on the point. Fresh evidence will only be allowed on the question what was the market rate at the date of the breach, if it is found that the defendant had committed the breach.

11. The appellants are entitled to costs of the appeal. Costs in the lower Court to be costs in the cause.