

(1957) 06 CAL CK 0019
In the Calcutta High Court
Case No : Suit No. 3477 of 1949

The Shalimar Wood Products Limited	Vs	APPELLANT
Sitaeam Srigopal		RESPONDENT

Date of Decision : 19-06-1957

Acts Referred:

Sales of Goods Act, 1930 — Section 25, 41, 41(1), 41(2), 42

Citation : (1958) 2 ILR (Cal) 441

Hon'ble Judges : G.K. Mitter, J

Bench : Single Bench

Advocate : B. Das and Samaren Sen, for the Appellant; Amiyo Nath Bose and Monotosh Mookerjee, for the Respondent

Judgement

G.K. Mitter, J.—This is a suit for recovery of Rs. 21,000 paid by way of price of goods under a contract of sale, besides a sum of Rs. 5,144 claimed as damages for loss of profits on breach of the said contract by the seller, the Defendant herein.

2. The contract, which is not disputed, is one by which the Defendant agreed to sell and the Plaintiff agreed to purchase 500 gross of birch wood blocks of size 3" x 3" x 6* to be imported from abroad, the price being 71 shillings per gross c.i.f. Calcutta, delivery date being 4 to 6 weeks on receipt of a license. There was some delay in the import of the goods the reason whereof is not material. On June 24, 1949 the Defendant purported to deliver to the Plaintiff at its factory at Shalimar 500 gross of blocks of birch wood having already received in respect thereof a sum of Rs. 21.000. The Plaintiff's complaint is that the goods were wholly unfit for like purpose for which they were required, to wit, the manufacture of bobbins for jute mills, being full of cracks and knots and even containing large slices of bark. An alternative case is made that there was an implied term of the contract that the goods should be of merchantable quality or an implied warranty that the goods would be reasonably fit for the purpose for which they were required. The Plaintiff claims to have rejected the goods on June

25, 1949 and intimated the Defendant of such rejection in writing.

3. The defence taken is manifold. It includes, inter alia, (a) that the Defendant acted only as an agent in the transaction for foreign principals, (b) that there was no warranty with regard to the quality of the goods mentioned in the plaint, (c) that the Plaintiff had accepted the goods and consequently was not entitled to reject them afterwards, (d) that the goods were not defective as alleged in the plaint or at all and (e) that the Plaintiff was not entitled to claim refund of Rs. 21,000 or any sum as loss of profits. The issues settled are as follows:

(1) Is the Defendant personally bound by the contract?

(2) Was there any condition and / or an implied term in the contract as alleged in paras. 3 to 5 of the plaint?

(3) Did the Plaintiff accept the goods which were delivered on June 24, 1949?

(4) Were the goods not of contracted quality?

(5) Is the Plaintiff entitled to obtain refund of the sum of Rs. 21,000? Is the Plaintiff entitled to any damages?

(6) To what relief, if any, is the Plaintiff entitled?

The brief of documents which contains the relevant correspondence between the parties was marked as Exhibit A herein and the contents of this will show the attitude of the respective parties and their version before the institution of the suit.

4. I do not propose to deal with the first few letters by which the contract was formed inasmuch as the Defendant after the raising of the issues did not want to press the first one, viz., that relating to its character as agent in the transaction. It is enough to say that by letter of September 30, 1948, the Plaintiff made it known to the Defendant that it was interested in the import of beach and birch wood blocks of the size mentioned for use in the manufacture of jute mill bobbins and as such the purpose for which the wood was required was known to the Defendant right from the beginning. It is not necessary to deal with the correspondence between the parties between November 1948 and April 1949 as the same does not throw any light on the questions raised. Bill receipts and challans of Aurora and Sehgal Ltd. the clearing agents of the Defendant for the transport of the goods from the Port Commissioners' sheds to the Plaintiff's factory exhibited in this case go to show that delivery of the blocks took place on June 24, 1949. Before raising the issues learned Counsel for the Defendant indicated to the court that one of his main defences would be that the goods had been negligently stored in the open after delivery and that this accounted for the cracks in the wood, it being contended that even a few hours' exposure of these blocks to the hot June sun would be enough to render them unfit for the manufacture of bobbins. This case, however, was not persisted in to the end probably in view of the evidence of one Dr. Kapoor examined on behalf of the

Plaintiff. Dr. Kapoor stated that if the blocks were properly seasoned such a deterioration could not take place within the space of a few hours. The dispute between the parties commenced as soon as the goods were delivered. The Plaintiff wrote a letter to the Defendant bearing date June 25, 1949 which runs as follows:

We regret to inform you that the shipment of the above blocks received on the 24th instant being cleared through your Clearing Agents Messrs. Aurora and Shegal, is quite unsuitable for manufacturing bobbins. The blocks received are mostly cracked, full of knots and not free from bark. Hence, they are of no use to us and we are therefore quite unable to accept the lot.

Please send your representative to our factory for inspection of the lot to be convinced of our statement and to do the needful in the matter.

5. This was replied to on June 29, 1949, but from the reply it does not appear when the Plaintiff's above letter was received by the Defendant, neither does the original letter of the 25th bear any endorsement to show when it had reached the addressee. By the reply of June 29, the Defendant urged that the Plaintiff's order had been placed with its shippers for execution and accordingly the Defendant was not liable. The Plaintiff refuted this contention by letter of July 7, and asked for refund of Rs. 21,000. A survey of the goods was held by one Mr. Rap ley who was connected with Gladstone Lyall and Company The report bearing the date July 9, 1949 shows that the complaint of the buyer was justified in that at least 55 per cent of the blocks were useless for the manufacture of bobbins. It does not appear from the correspondence that this survey was held with the knowledge of or in the presence of any representative of the Defendant. On July 14, 1949 the Plaintiff informed the Defendant that it would send the latter a copy of the report of Lloyds' Surveyors. By letter of July 7, already mentioned the Plaintiff stated that the Defendant's representative one H. P. Modi had inspected the goods and was convinced of the assertion of the Plaintiff about their quality. By letter of July 11, the Defendant denied that Modi had ever inspected the goods and that all that lie had suggested was that the goods should be surveyed by any competent surveyor so that the report could be sent on by the Defendant to its shippers.

6. I do not think it necessary to refer in greater detail to the correspondence which passed between the parties in view of the contentions which are ultimately pressed on behalf of the Defendant, viz., that the goods had been accepted by the Plaintiff and no question of rejection could arise. The Plaintiff's claim, if any, lying only in damages for breach of warranty is not to be found in. the plaint. It is, however, significant that throughout the long correspondence no statement was ever made on behalf of the Defendant that the goods had been left lying in the open in the Plaintiff's factory and that exposure to the inclement June weather was responsible for the deterioration complained of. More than once the Plaintiff stated that Modi had called at the Plaintiff's factory and inspected the goods, and this assertion was stoutly denied by the Defendant. By letter of

August 13, 1949 the Plaintiff's solicitor stated that the sample block given to the Plaintiff had been tested at its laboratory and this again was denied by the Defendant's solicitor who wrote to say that the Defendant was not aware of any test at the Plaintiff's laboratory at any time. A letter on record bearing date August 24, 1949 from Linden and Lindstorm, who were responsible for supplying the goods in suit from Sweden, contains the following statement:-"Short "pieces of 6" will easily crack and if they are exposed to the "sun a few hours only, they will be seriously damaged. The "reason why blocks have cracked must therefore be that they have "been unsuitably stored at Calcutta". It would thus appear as if the case sought to be made at first that the goods had deteriorated by negligent storage was inspired by this letter although not persisted in ultimately at the trial.

7. The Plaintiff examined several witnesses, the first being one of its partners Satyanarayan Khaitan. He spoke of the delivery of the goods on June 24, 1949 between 4 and 5 in the afternoon and said that he first saw the goods on the evening of the said date. As the only defence raised relates to the acceptance of the goods by the Plaintiff it will be useful to set out in extensor the relevant questions which were put to this witness and his answers thereto.

8. Q. 24. COURT: What did you find?-As we were in need of some goods we inspected the goods and found that the goods were cracked and knotty. The goods were delivered at about 4 or 5 in the afternoon and as we were in urgent need of some goods I inspected the goods at about 6 or 7 in the evening and found the goods to be in extremely bad condition.

9. Q. 25. COURT: Could you make bobbins out of the goods supplied-No, certainly not. When I inspected the goods I took some quantity of the goods on the machine in order to see if bobbins could be made out of the goods and I found that bobbins could not be made out of the goods.

10. In answer to question 66 the witness stated that the blocks which he had got had big cracks and when placed on the machine the cracks enlarged themselves and the blocks fell to pieces.

Q. 68. What were the defects?-If the knots in the bobbin blocks are very much dried up then the knots came out if the knots are big in size and they are of raw wood then when they are fixed with the bobbins they get cracked.

Q. 69. Did you find many knots in the bobbin blocks supplied to you?-Yes.

Q 70. Did you find any bark on the blocks supplied?-Yes.

Q. 222. Can you tell me if you remember the time approximately when you used those blocks for the manufacture of bobbins?--I had been there to inspect goods at 6-30 or 7 and thereafter I put some blocks on the machine. It might be at 7 or 7-30, 8 or 8-30.

11. The witness stated that on receipt of the letter, dated June 25, 1949. the Defendant had sent its representative Modi to inspect the goods and that the

latter had inspected them. Although questions were put about Modi's visit to the factory of the Plaintiff, Modi who was present in Court was not examined to contradict the Plaintiff's version. A substantial portion of the cross-examination of the witness was devoted to showing that the goods were kept in the open, that the Plaintiff had no go-downs and that the deterioration was the result of storage in the open. Although the Plaintiff had not disclosed documents in this respect before, the witness produced at an adjourned hearing of the suit several plans which would go to show that the Plaintiff had sought for permission from the Howrah Municipality to put up sheds and that it had paid several bills of contractors in this connection.

12. Replay the second witness frankly conceded that he was not a timber expert by any means, that he had merely examined the goods superficially and found a large number of them to be useless for the purpose of manufacture of bobbins. He admitted that this was the only instance when he had been called upon to give a report on the condition of birch wood blocks and even the moisture content of the blocks as mentioned in his report was not checked by himself but had been noted down at the suggestion of the Plaintiff.

13. Dr. Shankar Nath Kapoor, examined on behalf of the Plaintiff, stated that he had been the Chief Research Officer at the Forest Research Institute, Dehra Dun, from 1924 to 1950 and in charge of the seasoning department. His evidence really is not material in this suit in view of the issues which were pressed by the Defendant. He merely stated that seasoned wood would not split easily and that the last week of June in Calcutta would not normally be the time when seasoned wood would crack under exposure to the sun and that such wood would be more likely to crack in (he month of May when the sun is hot and the wind is dry than in June when the air usually is fairly humid.

14. Narayan Chandra Chatterjee was next examined on behalf of the Plaintiff to prove the moisture content to the blocks. He said that he had himself made the examination and described the process by which he had arrived at the result but as he did not note it down anywhere one cannot take serious notice of his evidence. The last witness on behalf of the Plaintiff Dol Gobinda Pal said that the two persons by the name of Mahatma Singh and Ajit Kumar Sarkar who had signed the challans of Aurora and Shegal Ltd. were both on leave at the time of the trial of the suit although they were still in the Plaintiff's employ.

15. As against this the Defendant examined only one Jnanendra Nath Sen who said that he was a jetty sarkar of Aurora and Shegal Ltd., and that he was responsible for effecting delivery of the imported birch wood at the Plaintiff's factory in June 1949. According to this witness 10 lorries were engaged for this purpose and the delivery commenced at 10 o'clock in the morning. It is difficult to place much reliance on oral testimony of this kind because the witness was speaking of events which took place 8 years ago and this was not the only work of the kind he had been entrusted with it being his business to deliver goods to different factories from time to time. I find it impossible to rely on his recollection

that he had delivered the goods not in a shed but in the open yard of the Plaintiff's factory in the absence of any contemporaneous writing from which the witness could refresh his memory.

16. Arguing the case on behalf of the Defendant learned Counsel Mr. Bose contended that on the evidence of the Plaintiff the only conclusion to be reached was that the goods had been accepted within the meaning of Section 42 of the Indian Sale of Goods Act. The relevant sections of the Act are 41 and 42. Section 41(1) provides that "where goods are delivered to the buyer which he "has not previously examined, he is not deemed to have accepted "them unless and until he has had a reasonable opportunity of "examining them for the purpose of ascertaining whether they are "in conformity with the contract". Sub-section (2) is not material for the purpose of this suit. Section 42 provides: "The buyer is "deemed to have accepted the goods when he intimates to the seller "that he has accepted them or when the goods have been delivered "to him and he does any act in relation to them which is "inconsistent with the ownership of the seller, or when after the "lapse of a reasonable time, he retains the goods without intimating "to the seller that he has rejected them". These sections, it should be noted, closely resemble provisions in the English Sale of Goods Act of 1893. The interpretation put upon the English sections by Judges in England ought in the absence of good reason to the contrary to be respected and followed here. Mr. Bose relied strongly on the case of *E. Hardy and Company (London) Ltd. v. Hillerns and Fowler* (1923) 1 K.R. 658 The matters arose out of an award stated in the form of special case and Greer, J. found that the buyer had accepted the goods on the facts before him which were as follows:

The sellers had agreed to sell to the buyers a quantity of Rosario and or Santa Fe wheat shipped by a steamer from a port or ports in the Argentine Republic and/or Uruguay. The vessel arrived at Hull, the port of discharge, on the 18th March, 1922. On the 21st March the buyer without having examined the wheat, resold a substantial portion of it to sub-purchasers and forwarded it to them. On the 23rd March the buyers having examined samples of the wheat rejected it on the ground, as the fact was, that it was not Rosario or Santa Fe wheat.

17. Greer, J. observed:

If the buyer has taken the risk of dealing with the goods before he has exercised a reasonable opportunity that he has of examining them, he cannot reject them if the act which he has done is one which is inconsistent with the ownership of the seller and to send them away from the place where the seller has delivered them and subject them to the risk of railway transit and the risks of deterioration, if they are goods that would deteriorate, is in my judgment inconsistent with the ownership of the seller.

18. His Lordship came to the conclusion that there had been acceptance of a part of the goods by sending them on to the sub purchaser and therefore the buyer must be taken to be bound by that and he could not accept a part and reject the

balance.

19. On appeal from this judgment reported in *Hardy and Company v. Hillerns Fowler* (1923) 2 K.B. 490 speaking of the position of a buyer of goods u/s "25 of the Sale of Goods Act, *Atkin, L.J.* observed (at page 498) that "when he does an act in relation to the goods which is "inconsistent with the ownership of the seller the section must be "treated as coming into operation notwithstanding that the "reasonable opportunity of examining them has not expired; as for "instance where a man having had goods delivered to him turns "them or part of them at once into his mill and uses them in tke "manufacture". This observation was really net necessary for the purpose of this case but a dictum of *Atkin, L.J.* is entitled to the utmost respect but even then I venture to think that his lordship never meant to lay down that if a buyer turned a very small portion of the goods delivered into his milt for the purpose of testing whether the goods were of contract description he would be taken to have accepted the goods. Further it cannot be said that because the buyer has made use of a part of the goods so as to alter its nature permanently putting it out of his power to return the used portion in the same condition in which it was received from the seller it must necessarily be concluded that he had accepted that particular part of the goods, and therefore following the dictum of *Greer, J.* he should be held to be debarred from rejecting them. Indeed if such a contention was accepted without qualification the right of inspection or examination might in some cases be rendered absolutely useless. If for instance, a chemical was supplied I do not doubt that any one would suggest that a portion of it could not be examined or analysed to see whether it corresponded with the description of the goods in the contract. Again if there was a contract for delivery of a quality of cement, say of 500 bags, I do not think it could be suggested seriously that the buyer would not be at liberty to unstitch one of the bags and test a portion of its contents to find out how soon it would set in order to arrive at the conclusion whether it was really cement or river silt closely resembling the said commodity. Speaking for myself, I would interpret the dictum of *Atkin, L.T.* to mean that if the buyer, after receipt of the goods, sends them or a portion of them into his mill or factory, not for the purpose of testing their intrinsic quality where superficial examination would not be enough, but for the purpose of manufacturing finished products out of them in the ordinary way of his business he unreservedly accepts them; and consequently, if thereafter he finds that the goods are not of the quality contracted for, he cannot complain on that score and reject the goods. His remedy then would be one in damages only for breach of warranty.

20. On the facts before me where blocks of birch wood were supplied with superficial cracks, I think the buyer would not be exceeding his right of inspection if he put a few of them to the test to see whether bobbins could be made out of them. The question of the nature of the user of the goods, to my mind, is one of intention. Can it be said of the Plaintiff when he put the good to the machine that his object was not to lest their quality but straightway to manufacture bobbins? In any view the evidence does not disclose that such was

the Plaintiff's object. How many blocks the Plaintiff's partner had put to the test has not come out in evidence but I see no reason to disbelieve his statement that the sole object of taking a few blocks out of the crates and submitting them to the machine was for the purpose of inspection and nothing more. The answers to the issues raised are as follows:

The first issue is not pressed and is answered against the Defendant.

Issue No. 2: Mr. Bose did not contest this issue and in my view he could not very well do so on the face of the correspondence disclosed.

Issue No. 3. This was the only issue pressed and in my view the Plaintiff cannot be said to have accepted the goods delivered on the 24th June, 1949.

Issue No. 4. As regards the quality of the goods the evidence is all one way, that is to say, of the oral testimony of the Plaintiff and that of John Turnbull Rapley coupled with his report. No evidence was adduced on behalf of the Defendant at all as regards the quality of the goods.

Issue No. 5. The Plaintiff, in the circumstances of the case, must be held entitled to obtain refund of the sum of Rs. 21,000. As regards the question of damages although an issue was raised Mr. Bose, learned Counsel for the Defendant, frankly admitted that on the evidence adduced about the price of the bobbins which were supplied by the Plaintiff at the relevant time he could not very well contest the claim of the Plaintiff on this score and the Plaintiff's claim to the extent of Rs. 5,144 must be accepted.

Issue No. 6.-In the result there will be a decree in favour of the Plaintiff for the sum of Rs. 26,144 with interim interest at 6 per cent on the sum of Rs. 21,000, interest on judgment at 6 per cent and costs.

21. The stay of the operation of the decree is granted for a month