
(1960) 01 CAL CK 0041
In the Calcutta High Court
Case No : A.F.O.D. No. 98 of 1953

Union of India (UOI)

APPELLANT

Vs

Mouji Lal Shaw and Others

RESPONDENT

Date of Decision : 12-01-1960

Acts Referred:

Contract Act, 1872 — Section 73
Government of India Act, 1935 — Section 175(3)
Sales of Goods Act, 1930 — Section 57, 64(2)

Citation : AIR 1960 Cal 729 : 64 CWN 475

Hon'ble Judges : B.N. Banerjee, J;B.K. Guha, J

Bench : Division Bench

Advocate : J. Majumdar, Addl. Govt. Pleader, for the Appellant; Sarat Chandra Jana, Arun Kumar Jana and Kshetra Mohan Chatterjee, for the Respondent

Final Decision : Allowed

Judgement

Banerjee, J.—This appeal, at the instance of the defendant Union of India, is directed against a decree for damages, amounting to Rs. 21,716/-, on account of non-delivery of goods.

2. Facts, as hereinafter stated, leading upto the sale of the goods, of which the delivery of the whole could not be given, are not disputed. Chewringhee Sales Bureau Ltd., (Defendant respondent No. 2) were auctioneers appointed by the Union Government and under express instructions from the Regional Commissioner (Disposals) (Ex. I(5) and I(4)) advertised for sale in public auction of 145 tons of Sal timber, as per conditions of sale contained in the notice (Ex. A). Thereafter, on 15-10-1946, the aforesaid goods were sold in auction at the workshop and store yard of Messrs. Indian Metal Corporation at 16, Belur Road, Howrah, where the goods were stacked and plaintiff Moujilal Shaw made the highest bid at Rs. 3,500/-, as the bid sheet (Ex. H) shows. He deposited a sum of Rs. 1000/- with the fall of the hammer and later on the same day, paid the balance of the price along with the sales tax. All these appear from the advance

slip (Ex. 6) and the Cash Bill (Ex. 4). A delivery order on the stockist of the goods, Messrs. Indian Metal Corporation, the purport of which is contained in the plaintiff's letter, Ex. 1, directing the said Stockist that delivery must be given "by measurement (weight by weight) and a receipt obtained" was made over to the plaintiff.

3. The plaintiff, however, alleged that he could not take delivery, firstly, because the stock of timber sold, was found short by about 33 per cent and, secondly, because the stockist refused delivery. These will appear from letters marked Ex. 1(d) and I(a), respectively dated the 17th and the 21st October, 1946.

4. The plaintiff wrote to the authorities complaining about the non-delivery of the goods. The Chowringhee Sales Bureau Ltd., the auctioneers, wrote to Messrs. Indian Metal Corporation to give delivery of the goods sold to the plaintiff (as appears from the letter Ex. 1 dated 23-11-1946). So also did the Controller of Production (as appears from letter Ex. I(1) dated 2-11-1946) but only 18 tons were delivered to the plaintiff, on the 3rd and the 4th of December, 1946.

5. Then followed a chapter of correspondence by the Chowringhee Sales Bureau, the Regional Commissioner (Disposals), the Controller of Production, the Indian Metal Corporation and the plaintiff, one against the other, between December 7, 1946 and March 6, 1947 (Ex. 1 (a), 1 (b), 1 (c), I, I (h), I (j), B (1), B (2), B (3), B (4) and B (5)) evidencing plaintiff's repeated endeavours and failures to obtain delivery and strong support on paper by the Regional "Commissioner and the Controller of Production to the cause of the plaintiff. The letter Ex. B(5) written by the Controller of Production to Messrs. Indian Metal Corporation, dated 6-3-1947, is revealing of the situation and need be referred to:

"Ref: Your letter No. LW/291 dated 24-2-1947 and subsequent discussions of the undersigned on 13-3-1947 with your Mr. Banerjee and Mr. Ganeriwalla.

This is to confirm that in the above discussions it was agreed that you would deliver the above timbers to the buyer. Mr. Moujilal Shaw, on production of the letter when he calls on you for collection of the timber on 10-3-1946 at 11 a. m. onwards. To avoid any further controversy or dispute whatsoever, it was also mutually agreed that one of my representatives will accompany the buyer and in the event of your failure or refusal to deliver the timber to the purchaser, you shall be entirely responsible to make good any loss suffered by the Government in the transaction.

x x x xx

Copy to :--

* * * * *

2. Messrs. Moujilal Shaw, Iron and Metal merchant, 1, Ghola Danga 3rd Bye Lane, Howrah, Ref. his letter no. nil dated 10-2-1947. He will please call in this office on 10-3-1947 at 10-30 a. m. sharp and accompany one of my

departmental Inspectors to the premises of the above firm for collection (on production of this letter) of the entire timber within one week from that date, failing which he will be entirely responsible for making good any loss suffered by the Government in the transaction"".

As a result of the action, as in Ex. B (5), the plaintiff obtained, on 15-3-1947, delivery of another 39 tons of timber. The total quantity delivered to the plaintiff thus come upto 57 tons. This is admitted by the plaintiff in his letter Ex. B(7), dated 24/25 March 1947. Challans Exs. 8(a) and 8(b), dated 15-3-1947, also prove the delivery of 39 tons of timber to the plaintiff.

6. The third Chapter of the correspondence between 5-6-1947 to 31-7-1948 (Ex. B (8), B (9), B2(h), and 2(n)) goes to show that the plaintiff did not get delivery of the remaining Sal timbers, in spite of his best endeavours and that the government made a half-hearted attempt to settle the matter on incorrect premises -- Letter Ex. B(8), dated June 5, 1947, from Chowringhee Sales Bureau Ltd., to the Controller of Production is to the following effect: "Please refer to the letter No. Nil of 30th May, 1947, from Mr. Moujilal Shaw, 1, Gholadanga 3rd Bye Lane, Howrah and expedite to drop the matter as it is a case of long standing. It is a matter of great regret that the stock-holders of the Government do not comply with the instructions from the Government Officers and consequently the purchasers of the Government goods are fallen to troubles after paying the money in full. It seems that the Government do not like at all to settle this long standing case.

Please pay your first attention to this case and settle it".

There is nothing to show that condemnation contained in letter Ex. B(8) was unmerited. Letter Ex. I(h), dated 30-1-1948, from the Regional Commissioner (Disposals) to the plaintiff shows that the plaintiff was called to a conference with the Assistant Director (Disposals) to settle the dispute over non-delivery.

-----Letter Ex. I(n), dated 31-7-1948, by the Assistant Director (Disposals) to the plaintiff is hereinbelow set out:

X X X X

"Out of 145 tons of Sal Timber sold at the above auction and purchased by you, 62 tons 19 c.u. it. has already been removed by you. It has, however, been decided to allow you a refund to Rs. 482-2-0 being the cost of 20 tons of Sal Timber supplied short to you (removed by Paharpur Depot). You are therefore, advised to submit your bill in triplicate, duly stamped and receipted addressed to the Dy. Accountant General (Industries and Supplies) New Delhi with reference to this office letter No. RCC/D/2/SR/534 (Misc), dated 27-1-48 to whom the relevant Treasury Receipt has already been passed.

You are further directed to remove the balance 63 tons of the store still left unremoved by you from the stockholder's site within ten days from the date of issue of this letter failing which the sale of the store remaining undelivered will

be cancelled and the goods disposed of elsewhere at your risk and expenses as per conditions of sale without any further reference to you. Please note that the decision communicated above is without prejudice to Government's right to levy ""Ground rent" for the period if considered necessary".

The assumption that plaintiff got delivery of 62 tons 19 cubic feet of timber, as in the letter above, is wrong and it was admitted before us that the plaintiff received delivery of 18 tons and 39 tons and odd making a total of 57 tons and odd. An attempt was made in paragraph 11 of the Written Statement, filed by the Union of India, to the effect that there was no removal made of 20 tons of timber to Paharpur, out of the stock sold to the plaintiff, by the Union Government. This version of the Written Statement was disbelieved by the Trial Court and that finding was not disputed before us.

7. The plaintiff refused the proposal contained in letter Ex. I(n). He also served a notice, dated 11-8-1949, on the Union Government u/s 80 of the Code of Civil Procedure.

8. Even after the service of the notice u/s 80 of the Code of Civil Procedure, last minute attempts to settle this dispute by giving delivery of the balance of the goods to the plaintiff from some other sources, e.g. from Paharpur lumber yard or from the stock held by Bird and Co., continued to be made, as will appear from letter Ex. B(17), dated 7-12-1949, Ex. B (20) dated 20-3-1949, Ex. B(21) dated 10-4-1950. All such attempts failed.

9. At last on 20-5-1950 the plaintiff filed the suit, out of which this appeal arises, on 19-5-1950, claiming Rs. 22,000/- as damages.

10. The learned Subordinate Judge came to the following findings:

(a) The conduct of Chowringhee Sales Bureau Ltd. defendant No. 2, was open and above board, and no liability for damages attached to them.

(b) " * * * The defendant No. 1, is certainly liable to compensate the plaintiff for the loss he has sustained. * * * According to the law, the quantum of damages is the market price at the date of the breach, that is to say, in 1946".

(c) " * * * I hold that the price of sized scantlings and slippers were certainly not much more than the price of seized timber sold to the plaintiff and could have been even less. So Rs. 200/- per ton is certainly a reasonable price for new sal scantlings sized as described in the Ext. A".

11. Calculating at the rate of Rs. 200/- per ton, the learned Subordinate Judge found that the plaintiff, was entitled to damages amounting to Rs. 17,513/- and interest thereon, at the rate of six per cent per annum, for 4 years, amounting to Rs. 4203/-, total Rs. 21,710/-. The decree for damages was passed against the defendant respondent 1, Union of India, alone.

12. Mr. Jajneswar Majumdar, the learned Additional Government pleader, with his usual fairness, conceded, at the beginning of his argument, that the case on

behalf of Union of India was thoughtlessly conducted, in the court below and cross-examination of the plaintiff's witnesses, on behalf of the Union Government, was perfunctory and lacking in ideas and did not demolish the evidence adduced on behalf of the plaintiff. He submitted that he was, therefore, compelled to confine his arguments to legal objections to the decree passed. He made it abundantly clear that the appellant was not in a position, on the evidence as it stood, to dispute the genuineness of the plaintiffs claim.

13. Mr. Majumdar, however, contended, in the first place, that the contract of sale between the plaintiff and the then Government of India contravened the provisions of Section 175(3) of the Government of India Act 1935, as the contract was not expressed to be made by the Governor-General and executed on behalf of the Governor-General, by such person and in such manner as directed by the Governor-General. He, therefore, contended that the contract was invalid and the plaintiff was not entitled to any damages for the breach of such a contract. This point was not taken in the written statement and no issue was framed on it. The point was raised in the Court below only in course of the argument. The plaintiff may have been a good deal prejudiced by the manner in which the point was raised, Ex. 1(3), letter from the Assistant Regional Commissioner addressed to Chowringhee Sales Bureau Ltd., shows acceptance of the bid by the plaintiff. Whether that bid was accepted on behalf of the Governor-General and a formal document, of the nature contemplated in Section 175(3) of the Government of India Act 1935, was also executed thereafter does not appear and we are not sure of the position. Be that as it may, there are other grounds as well, which justifies us in repelling this branch of Mr. Majumdar's contention. As between the plaintiff and the Government, there was no contract of sale at any time. The goods were advertised for sale in auction and the conditions of sale, as in Ex. A, reserved ample powers to the auctioneer not to sell. This will appear from the following conditions of sale: "The Auctioneers may without giving any reason therefore refuse to accept the bidding of any person or persons.

All lots are sold on the spot at highest bids subject to the realisation of reserve prices. If and when reserve prices are not reached, the highest bidder may if he so desires, submit his offer to the Regional Commissioner of Disposals through the Auctioneers for consideration".

Therefore, when the plaintiff offered his bid, "there was no pre-existing contract between the plaintiff and the Government that the goods would be sold to him, if his bid was the highest. Under the Sale of Goods Act there is a good deal of difference between an agreement for sale and a sale. Section 4(4) of the Sale of Goods Act provides that an agreement for sale becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods are to be transferred and Section 64(2) of the said Act further provides that in an auction sale, the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. In the facts of this case the plaintiff became a buyer without a prior agreement of sale. There is no

dispute that his bid was the highest and was accepted by the auctioneers and also accepted by the Assistant Regional Commissioner. If Section 175(3) of the Government of India Act was to be invoked, it would have been understandable, if Mr. Majumdar had argued that the sale was bad because there was no assurance of property, executed on behalf of the Governor-General, in favour of the plaintiff. That was not the form in which the point was canvassed before the Court below and that was also not the form in which the point was presented before us. We need not concern ourselves with a point, which was not argued before us. Lastly we, have reasons to hold that sale in favour of the plaintiff was saved by subsequent ratification by the Government. We are fortified in this view by the decision of the Supreme Court reported in *Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others*, and also fey another decision of this Court reported in *Province of West Bengal Vs. Mohan Lal Jain*, . There are two reasons which induce us to come to our conclusions as to ratification of the sale. In the first place delivery of about 57 tons of timber was made to the plaintiff, out of the goods sold in auction. In the next place, in paragraph 5 of the written statement, filed by the Union of India, the sale and purchase of the goods by the plaintiff in auction sale was expressly admitted. Since the sale was not disputed, it should be deemed to have been ratified by the Union Government, its formal defect, if any, notwithstanding. For the reasons stated above, we overrule the first contention advanced by Mr. Majumdar.

14. Mr. Majumdar next argued that the frame of the suit was bad; the plaintiff might ask for refund of the price paid, proportionate to the goods not delivered, but not damages. This argument is misconceived and a complete answer to this argument may be found in Section 57 of the Sale of Goods Act, which entitles a buyer to sue the seller for damages for non-delivery, if delivery be wrongfully neglected or refused. We, therefore, overrule Mr. Majumdar also on the second branch of his argument.

15. But although we overrule the first two contentions of Mr. Majumder, we feel inclined to uphold him on his third contention, namely, that the amount decreed as damages was excessive.

16. The learned Subordinate Judge arrived at the figure Rs. 200/- per ton, as the rate at which damages were to be calculated, on the following line of reasoning:

(a) * * * *

The plaintiff purchased 145 tons of timber from defendant No. 1 and that the latter failed to deliver to the plaintiff 87 tons and odd out of the total amount sold. The defendant No. 1, is certainly liable to compensate the plaintiff for the loss he has sustained. For the purpose of compensating the plaintiff for the loss it is not the price paid for the timber i.e. Rs. 3500/- for 145 tons which, should be taken as the basis. According to the law, the quantum of damages is the market price at the date of the breach, that is to say, in 1946. * * *

(b) Now as regards market price of sal timber of equivalent quality, the plaintiff's

case is that the price was Rs. 250/- per ton. According to Jagannath Jadav, a timber merchant, the price of sal in 1948 August was Rs. 375/- to Rs. 400/- per ton. Chandra Dip Singh, another timber merchant who went to bid at the auction on 15-10-1946 says that he measured the quantity of timber offered for sale and that he found the timber new sal of various sizes. He corroborates the plaintiff when he says that 50 cubic ft. of timber are equivalent to 1 ton. In 1948 the price was Rs. 300/- to Rs. 350/- per ton, according to this witness, Ext. 9 shows purchase of some Sal slippers from S.R. Banerjee Ltd., a timber merchant, at the rate of Rs. 4-8-0 to Rs. 5/-per cubic ft. Ext. 10 shows that Martin's Railway offered to pay Dukhiram Rs. 7-8-0 per cubic ft. of sal slippers on 30-8-1949. and 6-8-1949, Ext. 10(c) and 10(d) show prices of scantlings. None of "the rates are less than Rs. 5/- per cubic ft i.e. Rs. 200/-per ton as claimed by the plaintiff. Accordingly I hold that the plaintiff is entitled to recover damages at this rate for the volume of timber which defendant No. 1 failed to deliver to the plaintiff. I hold that the price of sized scantlings and slippers were certainly not much more than the price of sized timber sold to the plaintiff and could have been even less. So Rs. 200/- per ton is certainly a reasonable price for new sal scantlings sized as described in the Ext. A".

17. Mr. Majumdar contended that if the breach of the contract was in the year 1946, as the learned Subordinate Judge correctly found, the rates prevailing either in 1948 or in 1949, as in Exs. 9, 10, 10(c) and 10(d), were of irrelevant consideration and in so far as the learned Subordinate Judge proceeded on such irrelevant basis, he was wrong. Mr. Majomder is correct in this contention.

18. Mr. Jana made an effort to contend that the breach did not take place in the year 1946 but much later. He drew out attention to the fact that the last part-delivery of the goods was made on 15-3-1947 and that even in July 1948, the Assistant Director (Disposals) was writing to the plaintiff in terms of compromise and settlement. He also relied on the fact that even after service of notice u/s 80 of the Code of Civil Procedure, on 11-8-1949, attempts to conciliate or to satisfy the plaintiff by giving to him delivery of the remaining goods from sources such as the Paharpur Lumber yard or the stock held by Bird and Co. did not cease. On these facts he contended that breach of the contract must be deemed to have taken place either in the year 1948 or in 1949.

19. This argument is wholly misconceived. The conditions of sale (Ex. A) fixed a period of 7 days after the sale, as the time, within which delivery must be taken and the goods removed. There is no dispute that the goods were in a deliverable state during the material period. In default of taking delivery, the buyer was liable, under the conditions of sale, to pay a penalty at the rate of one per cent per diem on the sale value or after one week's further default run the risk of resale by the auctioneer. These stringent terms also bound the Union of India to give delivery of the goods to plaintiff, at any time during the stipulated period. The seller, Union of India, did not effect delivery within the time fixed and not even within a reasonable time thereafter. The breach of the obligation to deliver,

therefore, took place after the lapse of seven days after the sale. The fact that the seller, Union of India, attempted to repair the breach in part, by effecting a partial delivery and also later on made futile efforts to repair the breach as a whole are matters of irrelevant consequence. Nevertheless, the Court below gave relief to the Union of India in so far as it succeeded in partially fulfilling its obligation, by effecting a delivery of 39 tons of timber, about five months after the date of the breach. The plaintiff respondent has not disputed the propriety of this part of the decree and we need not concern ourselves with that. But in so far as the obligation remained unfulfilled, the plaintiff's right to receive damages - was as at the date of the breach.

20. In *Barrow v. Arnaud* (1846) 8 Q. B. 595, the common law principle of the English law on this point was stated in the following language:

"Where a contract to deliver goods at a certain price is broken, the proper measure of damage in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy".

The Indian law is declaratory of the above common law principle, as was held in the case of *A.K.A.S. Jamal v. Moola Dawood, Sons and Co* 43 IA 6 : (AIR 1915 PC 48) Lord Wrenbury, in delivering the judgment of the Board observed:

"The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach -- with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach -- or is the seller bound to reduce the damages, if he can, by subsequent sales at better price? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market price rises.

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Staniforth v. Lyall* (1830) 7 Beng. 169 is an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of

the latter contract: *Yates v. Whyte* (1838) 4 Bing. 272; *Bradburn v. Great Western Railway* (1874) 10 Ex.1; *Jebson v. East and West India Dock Co.* (1875) 10 C. P. 300.

The decision in *Rodocanachi v. Milburn* (1886) 18 Q. B. D. 67 that market value at the date of the breach is the decisive element, was upheld in the House of Lords in *Williams Brothers v. Agius Ltd* (1914) A. C. 510.

21. The decision in 43 IA 6: (AIR 1915 PC 48) was referred to by Sir Shadilal in AIR 1938 67 (Privy Council) and he was also of the opinion that S. 73 of the Indian Contract Act was merely declaratory of the common law principles, as to measure of damages.

22. That being the position in law, if the plaintiff cared, to live in the hope that the breach of the obligation would be repaired by the Union of India or its agents in some future date, that was his choice. But that would not entitle him to claim damages at the market rate of the day when his hopes for reparation were dashed to pieces.

23. In the view that we take we have to hold that the plaintiff respondent has failed to prove the market price of the timber, that he purchased, as at the date of the breach. We are not prepared to go by the price paid by the plaintiff respondent himself in the auction sale, because we are not sure what type of publicity was given of the auction. The bid sheet Exhibit "H", printed at page 46 part II of the paper book shows, that the plaintiff respondent was the single bidder at the auction. This is some indication that the auction did not attract bidders and the plaintiff respondent may have bid just above the reserved price. If we ignore the price paid at the auction, neither the oral nor the documentary evidence give any indication of the market price as in October, 1946. The plaintiff respondent spoke of the price as in August, 1948. So did his witnesses P. W. 3, Jagannath and P. W. 5 Chandradip.

24. Having thus failed to prove the market rate as at the material time, the plaintiff is not entitled to the amount claimed as damages. He may at best be entitled to nominal damages, on the evidence as it stands. But even then, we are of opinion, that the plaintiff should be given another opportunity to prove the market price as on the date of the breach. The reason why we are of that opinion is, that the plaintiff-respondent may have been misled by the attitude of the appellant's officers and agents. The efforts made on behalf of the appellant to effect delivery may have reasonably raised hopes in the mind of the petitioner and he might have mistakenly thought that the breach only took place when no more hopes were left in him.

25. We, therefore, set aside the judgment and decree of the trial court and remand the case to that Court to be re-heard on the point of measure of damages and on no other point. Parties will have liberty to adduce such evidence of market price as on the date of the breach as they may like.

26. This appeal is allowed to the extent as indicated above. Having regard to the fact that the appellant was in breach of its obligation, we do not make any order for costs in its favour.

Guha, J.

27. I agree.