
(1959) 12 MAD CK 0013

In the Madras High Court

Case No : C.C. C. Appeal No. 16 of 1956

V.R. Mohanakrishnan

APPELLANT

Vs

Chimanlal Desai and Co.

RESPONDENT

Date of Decision : 01-12-1959

Acts Referred:

Contract Act, 1872 — Section 230(1)

Citation : AIR 1960 Mad 452

Hon'ble Judges : Ramaswami, J;Anantanarayanan, J

Bench : Division Bench

Judgement

Anantanarayanan, J.

(1) The appellant is the plaintiff in a suit in the City Civil Court Madras for recovery of Rs. 11080/- as damages for alleged breach of contract. The

case of the appellant was that he entered into two contracts with the defendant-firm (Chimanlal Desai and Co.) for the supply of 500 and 1000 fan

belts for Mack Trucks under indent orders Nos. 5039 and 5052 dated 18-4-1949 and 7-5-1949. It is not in dispute between the parties that,

with regard to indent No. 5052, the fan belts, 1000 in number, were supplied to the plaintiff-appellant about the end of July, 1949.

But the suit was with regard to the alleged failure of the defendant-firm to supply the 500 fan belts covered by indent NO. 5039. The defendant-

firm contended that the contract was really between the plaintiff and Messrs. Thermoid Company, Trenton N. J. U.S.A., and that they merely

acted as the agents of the plaintiff with reference to the suit transactions. They further explained that the goods in question arrived in Madras by S.

S. Exchange in or about the middle of July, 1949, as anticipated. But unforeseen difficulties were experienced in clearing the goods from the

Customs Authorities at the Madras Port Trust.

The aforesaid Authorities wrongly decided that the import licence of the defendant-firm (No. 31744/U.S.A./D.C.C) did not permit them to import

the suit goods which were accordingly confiscated under the Sea Customs Act, delivery being permitted only upon payment of a heavy penalty.

The defendant-firm appealed to the Chief Controller of Imports, New Delhi, and, though that authority took the favorable and correct view, further

difficulties were experienced, as the Collector of Customs had no power under the Sea Customs Act to review his own order.

The matter had to be thus placed before the Central Board of Revenue, and they passed an order as late as 14-1-1951 allowing the defendant

firm to clear the goods, upon which the firm promptly cleared the goods through their agents, Messrs. Thomas Cook and Sons. But, in the

meantime, the plaintiff had rushed into court with this action, which, according to the defendant-firm, was unsustainable upon both grounds that the

defendant-firm were not personally liable upon the contract, and that there was really no breach of contract, as the delay had been occasioned by

causes totally beyond control. It was the plaintiff who failed and neglected to take delivery of the goods, which were still remaining in the hands of

the defendant-firm at the time of suit.

(2) After relevant issues had been framed in the suit, the suit was tried upon the merits, and the learned Assistant City Civil Judge came to the

conclusion that the defendants were the accredited agents of a merchant resident abroad, and hence that they were liable to be sued u/s 230(1) of

the Contract Act. He also came to the conclusion that the principle of frustration did not apply, and that, though time was not the essence of the

contract upon the original terms, still it was made essential by plaintiff's letter dated 21-8-1950 (Ex. A.31), wherein plaintiff specified that, if the

goods were not delivered within a week, legal proceedings would be instituted.

Hence, he concluded that the defendant-firm did commit breach of the contract. After these findings, the learned Judge proceeded to dismiss the

suit, upon the admittedly extraordinary and unsatisfactory ground that no materials had been placed before him by the plaintiff, for ascertaining

market price of the suit goods on the date of the breach, so that the quantum of damages could not be determined. The learned Judge states:

In the aforesaid circumstances, I hold that no materials have been placed before the Court by the plaintiff for ascertaining the market price of the suit goods on the date of breach. So, I hold that the plaintiff has failed to prove the market price, and he is therefore not entitled to claim any amount by way of damages for breach of contract:.

(3) Learned counsel for the defendant-firm (Mr. V. Thiagarajan) submits that he is entitled to support the decree of the lower Court, not necessarily upon the halting conclusion of the trial Court that, upon the materials, it was unable to fix the quantum of damages for a breach of contract it had determined, but by canvassing the findings upon the other two vital issues, with regard to which, according to him, the lower court was palpably in error. This he is admittedly permitted to do, and the appeal has really resolved itself into an analysis of the arguments upon this aspect.

For, it is needless for us to observe that, if we accept the findings of the lower court upon the two vital issues, the dismissal of the entire suit upon the ground that the materials were not sufficient for ascertainment of damages, would be clearly unsustainable. We would have no alternative but to allow the appeal, and either to remand the suit for fixing of the quantum of damages to the extent permitted by the record and the findings, or to permit both parties to adduce evidence upon this matter.

The arguments of learned counsel for the defendant-firm may be clearly and tersely summarised as follows:(1) The contract was, both essentially and in form, between the foreign merchant (Messrs. Thermoid Company) and the plaintiff. The offer was to the merchant resident abroad, the acceptance was by him, and the contract was between these two principals, as juridical entities. The defendant-firm throughout acted as an agency for establishing the necessary contacts, and Sec 230(1) of the Contract Act has no application at all in this case. (2) In any event, and even assuming that the defendant-firm entered into the contract on behalf of a foreign principal, and could thus be sued upon by the application of the principle of Sec. 230(1) of the Contract Act, the terms of the contract explicitly exonerate the defendants. The delay occurred owing to causes beyond the control of the defendant-firm, time was not the essence of the contract, and such delay was protected by the specific terms of the

contract. Since no breach of contract really occurred, the defendant-firm could not be liable for damages at all.

(4) We shall take up this second argument first, as it appears to us to be practically conclusive. The merits here are very clearly established upon

the facts, and indeed it is difficult to see why the Court of trial proceeded to apply the doctrine of frustration to a case like the present, and then to

hold that the doctrine could not be stretched to protect the defendant firm. If we assume, *ex hypothesi*, that the defendant firm entered into the

contract on behalf of the foreign merchant, and was personally liable, the firm is clearly entitled to the benefit of the terms of the contract, as much

as the foreign principal.

We do think that this could be disputed, for the plaintiff (appellant) cannot have it both ways here. But, when we look to the contract, we see that

the defendant firm and the foreign principal are both very fully protected, with regard to the consequences of a delay of this character occasioned

by an error of the Customs Authorities. We shall immediately proceed to set forth the relevant pieces of evidence here, and this is adequate to

dispose of the appeal. Nevertheless, we are not contenting ourselves with this, but we are also scrutinising the evidence and the principles of law

applicable, upon the first ground, on account of its considerable interest and importance to the mercantile community.

(5) In Ex. A-1(a) which is a copy of the indent, the plaintiff addressed the foreign principal (M/s. Thermoid Company) with a request for order of

the goods "on our account and risk". We then come to cl. 9 of the indent, namely:

If however, later shipment should be due to force Majeure or to circumstances over which you have no control, then I/We agree to accept such

later shipment without any objection, and without raising any claim whatever.

Then we proceed to paragraph 24:

I/We distinctly agree not to hold you responsible for non-shipment, be the same due to Force Majeure or to any other causes".

Paragraph 29:

Chimanlal Desai and Co. are acting as agents, not as principals in this transaction".

Paragraph 33:

I/We further agree that if you open a credit for goods ordered, it will be entirely on my/our account and risk and I/We will honour all drafts,

presented even should the goods not arrive, or be refused landing, through any act of War or restrictions imposed by Government Ordinance or by

any other cause whatsoever".

The further pieces of evidence to be referred to, are the letters forming the correspondence between the Customs Authorities and the defendant

firm, and between the plaintiff and the defendant firm (Exs. A-11 to A-15, A-16(a) A-21, A-26, A-27, A-29, A-30, A-31 etc.). They very clearly

establish (1) that the goods were detained by the Customs Authorities under the Sea Customs Act, upon an error, and refused delivery except on

payment of heavy penalty, (2) that the defendant firm, to whose name M/s. Thermoid Co., had shipped the goods, said who held the necessary

import licence, had to appeal to the Chief Controller of Imports, New Delhi, and to obtain rectification of the error and (3) that, even after this,

there was considerable delay, because the Collector of Customs could not review his own order, and the Central Board of Revenue had to has

final orders in the matter for clearance of the goods. The goods were to be delivered as soon as possible, and the learned Judge himself has found

that, in this sense, time in the sense of a date-line was not the essence of the contract.

It is very clear that the delay was occasioned by causes quite beyond the control of the defendant firm, and that they are fully protected by the

explicit terms of the contract that we have set forth earlier. But the learned Judge below thought that because the plaintiff in Ex. A-31 categorically

stated that if the goods were not delivered within a week of the receipt of that letter, matter will be placed in the hands of the lawyers, time became

the essence of the contract. It is very difficult to see how this unilateral action of one of the two parties to contract, could impose such a new term,

when the defendant firm were fully protected against the consequences of such inevitable delays.

We therefore find that the defendant firm could not be sued upon for breach of contract, even taking the view that they were personally liable upon

the contract. This, as we have stated earlier is sufficient to dispose of the appeal, since it must constrain us to support the decree of the lower

Court dismissing the suit, though not upon the ground of dismissal by the learned City Civil Judge.

(6) But, in view of the importance of the matter, we shall proceed to examine the first ground also. As far as we can judge from the terms of the

contract and the surrounding facts, the two principals were the plaintiff and the foreign merchant. M/s. Thermoid Co., U.S.A. The indent is in the

form of an offer to the foreign firm, and cl. 29 specifically states that the defendant firm are acting as agents, not as principals in the transaction. The

defendant firm placed this order with M/s Thermoid Co., and the acceptance was by that company, which was communicated to the plaintiff. (vide

Ex. A-10 etc.).

The facts that the defendant firm held the import licence, that the goods were shipped in their name for clearance, as had necessarily to be the case,

and that Sales Tax was claimed from the plaintiff under S. 8(a) of the Sales Tax Act, do not alter the essential form of the contract, or the true jural

relationship. Actually, we find that learned counsel for the plaintiff in the Court below admitted that the indent form Ex. A-1(a) ""was taken in that

manner, as if it was a direct contract between Thermoid Co., and the plaintiff"".

We would emphasise that the form of the contract, the offer and the acceptance are the vital ingredients to establish the nature of the contractual

relationship, and that it would merely add an element of confusion to import irrelevant considerations such as the possession of a licence to import

the goods by the agent of the foreign principal, or the circumstance of a demand for payment of sales tax. The true question is whether in such a

context of facts, the defendant firm must be held to have entered into the contract on behalf of the foreign principal, and hence to be personally

bound within the scope of S. 230(1) of the Contract Act.

(7) We might first extract section 230(1) itself, for we think that, where a principle has been embodied in statute in this country, the wording of the

section is of greater importance than a reference to the background of the English authorities, which may undoubtedly be of great value, but which

may be equally misleading in certain contingencies. Codification has its own advantages and disadvantages, but it is a well settled rule of

interpretation of the Indian Law, that we must primarily look to our own enacted law and its terms, and refer to the background of the English

Common Law and precedents, only where there is no repugnancy, or in order to throw further light upon the principle taken from that source in

order to make it part of the codified law of this country. As imperfect realisation of this consideration, or neglect of this vital consideration, does

lead, and has perhaps led in the past, to confusion and ambiguity. Section 230 and sub-section (1) thereof run as follows:

In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases:

Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad".

(8) First, focusing attention upon the strict requirements of the section, we see that the vital words are "contracts entered into by him on behalf of his

principal". It will be a question of fact in each case, whether the contract is between a principal here and the foreign principal directly, or whether

the home-agent of the foreign principal has entered into the contract. If he has, his personal liability is exempted under the general principle, unless

there is a specific term of the contract stipulating such a liability.

But such a term of the contract will be presumed to exist, or, in other words, will be read into the contract, where the contract is made or entered

into by the home agent on account of a merchant resident abroad (sub-section (1)). This term being a presumption, it is rebuttable, though the

mode in which it can be rebutted remains unspecific. There are two complexities here, which may have to be examined. Firstly, are we to assume

that merely because the home agent of the foreign principal establishes the necessary contacts, or is the route through which the transaction is

effected, he enters into the contract himself or on behalf of his principal, within the scope of the section?

In other words, where the contract is in form between a merchant here and a foreign merchant as two principals, does the agent become a party to

the contract, because the communication has been inevitably through him as the holder of the import licence, or as the "architect of the contract" as

the learned counsel for the appellant (Mr. R. Gopalaswami Ayyangar) urges? We consider that it would be unwise to import such facts into the

determination of what is essentially a question of juridical relationship. For, once we do this, it would be difficult to determine how far such factors

can be relevantly assessed, and what weight should be placed upon him.

Confining ourselves, for the moment, to the strict language, and import of our enacted law (section 230 sub-sections (1)), it seems clear that, for

the personal liability of the home agent to accrue, it must be shown that the entered into the contract by or on behalf of his principal, by signing on

behalf of his principal, or in some other way proving the fact that the contract was one between the merchant here and the home agent on behalf of

a foreign principal. Where the contract is between two principals, in form and substance, the inconvenience of suing the foreign principal here, the

fact that the merchant ordering the goods might not have looked to the credit or performance of the foreign principal but of the home agent etc.

would be extraneous and irrelevant. In such a context, section 230 itself would not apply, and hence the liability under sub-sec. (1) of S. 230

would not arise. This, of course, will be a question of fact in each case.

(9) If we look at the manner in which the case-law has developed upon this aspect, we see the difficulty arising from references to sources in

English Law, without making adequate allowance for a different line of development in the enacted law of this country. In *Cheshire and Fifoot*:

Law of Contract"" (4th Edn. p. 394), there is a discussion of the development of law in England, upon this aspect. There was originally a

presumption that an agent who contracted on behalf of a foreign principal was alone able to sue or to be sued. The learned authors then observe:

The presumption however no longer exists, and the foreign principal no longer forms an exceptional case. With the increase of international trade

and the rapidity of communication, English suppliers of goods do not hesitate to rely upon the good faith and solvency of foreigners, while, on the

other hand, there is a reluctance in English agents to assume person liability for foreign principals. In the modern law, therefore, the question

whether the agent contracted personally is purely a question of intention.

In *Miller Gibb and Co. v. Smith and Tyrer Ltd.*, 1917 2 KB 141, Bakes L.J., referring to this presumption or custom in the trade, quotes Wright

J., in another case, tersely stating the presumption or usage, by means of the following dictum:

Another exception is that by usage, which is treated as forming part of the contract or of the law merchant, where there is a foreign principal,

generally speaking, the agent in England is the party to the contract, and not the foreign principal.

But the case itself was one in which, upon the face of the contract, the foreign principals were made parties to the contract by their specific

authority. It was held that, assuming that the custom existed, it did not apply where the custom was inconsistent with the contract. The custom or

presumption will also be found stated in Bowstead's Law of Agency" (11th Edn. 1951 Art. 92) in the following terms:

No foreign principal may sue or be sued on any contract made by a home agent, unless the agent had authority to establish privity of contract

between the principal and the other contracting party, and it clearly appears from the terms of the contract, or from the surrounding circumstances,

that it was the intention of the agent and of the other contracting party to establish such privity of contract"".

(10) It will thus be clear that, by the law in England, the question whether the agent of a foreign principal is liable upon the contract of a home

merchant with a foreign principal, is one depending upon the ascertainment of the intentions of the parties. Since, in English Law, the agent or the

principal can be sued at option, but not both, which is hence quite distinct (from the specific terms of Sec. 233 of the Indian Contract Act

rendering both liable to be sued, the true test in this country might not be the ascertainment of respective intentions at all, and this factor of

precaution will have to be borne in mind, in citations of English authorities upon the aspect.

It appears to us that, in at least certain of the Indian decisions, the distinction is not clear, and that a certain element of confusion has crept in,

because the ascertainment of probable intention has been imported into the situation. On the contrary, we must be very clear indeed in a given case

whether the contract is, in juridical form and substance, between the home merchant and the home agent of the foreign principal, entering into the

contract on behalf of his principal, or whether the home merchant and the foreign merchant are the direct principals.

In the latter case, Sec. 230 itself is inapplicable, and sub-section (1) therefore will not apply. If we take a case like *T. Basavaraju v. Parry* and

Co., ILR 27 Mad 315, we find from the facts that Messrs. Parry and Company signed as the managing agents of the foreign principal (East India

Distilleries Co. Ltd.), but that this form of signature was merely an authorised delegation of acceptance by the foreign principal himself. In other

words, Messrs. Parry and Company did not make the contract, or enter into it, on behalf of their foreign principal at all. The learned Judges who

decided this case, thought that the presumption u/s 230(1) could be invoked upon the facts, but that the presumption being rebuttable, it was

rebutted because:

the foreign principal himself is, in writing, made the contracting party, and the contract is made directly in his name". (at page 323).

With very great respect, we think that the true line of reasoning, though it may appear to be bolder, ought to be that the contract, in form and

substance, was between the two principals, that Sec. 230 did not apply, and that Messrs. Parry and Company were exempted from personal

liability upon this ground. In the later decision of this Court in Arunachalam Chettiar Vs. Kasi Nevenda Pillai, Agent of Messes. Ralli Brothers and

Another, , Sadasiva Iyer, J., followed the earlier Bench decision, and observed:

The presumption raised under S. 230 of the Indian Contract Act is rebutted by the fact that the contract is made in the name of the first

defendant's principal (whoever he may be), and not of the first defendant.

Here again, the difficulty is that if the contract is interpreted as one made by the home agent on behalf of the foreign principal, the presumption

would immediately arise, and it is hard to conceive how that presumption is rebutted, by the mere fact that the agent signs the contract designating

himself as such. On the contrary, the case will clearly be one of determination whether the contract is between the two principals, an agent intruding

only as the person responsible for establishing the necessary contacts.

The same kind of intellectual difficulty is apparent in Ganpat Mahadu Jadhav Vs. Forbes, Forbes Campbell and Co. Ltd., . Blackwell, J. referred

to the observations in J. R. Pillani v. Bansilal Motilal, AIR 1929 PC 132, and observed that the Indian Contract Act was not an exhaustive Code,

and that the English authorities may be looked into for ascertaining when an agent who contracts for a foreign principal is personally liable. But,

here again, it is rather difficult to see how the agent is not personally liable (Sec.

230 sub-sec. 1), where he has entered into the contract on behalf of his principal, and the presumption arises.

The most definite way in which such a presumption could be rebutted, would obviously be a term in the contract itself to the opposite effect,

namely, that the home agents of the foreign principal were not personally liable upon the contract. The English Law being different, based as it is

upon the ascertainment of intentions of parties, without any necessary presumption of this kind, it becomes somewhat misleading when those cases

are cited and applied, overlooking the explicit terms of Sec. 230 and sub-section 1; and also of Sec. 233 of the Act, which gives a right for a party

to sue both the agent and principal, unlike the law in England, which would confine the option to one or the other, but not to both.

(11) In the instant case, for reasons set forth already, we are of the view that the defendant firm did not enter into this contract by or on behalf of

the foreign principal, but that the contract was directly between the two principals of the plaintiff and the merchant resident abroad. Other cases

have also been cited before us, relating to an "undisclosed principal", or where the principal resident abroad cannot be sued (sub-section 3 of

Section 230), but they are not relevant here. The issue itself was somewhat unfortunately framed in the present suit, in the form:

Were the defendant acting as the agents of the plaintiff, or as agents for a merchant abroad?

These are not necessarily exclusive, and in one sense, a party in the situation of the defendant firm necessarily becomes an agent of the plaintiff also

for certain limited purposes. Vide *N. Samsuddin v. Malva and Co.*, 64 Ind Cas 943 (Bom). Upon the present facts, it is clear that Section 230

does not at all apply, and the mere facts that the defendant-firm held the import licence, that they established the necessary contacts, etc. would not

materially affect the situation, so long as the offer was to Messrs. Thermoid Company U.S.A. and the acceptance was by them, as the record

proves.

Mr. Gopalawami Ayyangar for the appellant, also advanced an argument that Sec. 230 sub-clause 3 could be invoked, but that clearly has no

force. There is nothing in the processual law in this country, or in private international law, to prevent the plaintiff-firm from suing Messrs. Thermoid

and Company in Indian Courts, though the question whether a decree so obtained could be effectively executed, is another matter altogether.

(12) In result the appeal fails and is dismissed with costs. The memorandum of cross-objections filed by the defendant which merely relates to a

claim for reimbursement of clearance costs, and which does not appear to be justified, is dismissed without costs.

(13) Appeal and cross-objection dismissed.