Balaji Paper Agency Vs Mysore Paper and Board Co.

Court: Karnataka High Court

Date of Decision: Aug. 6, 1990

Acts Referred: Contract Act, 1872 â€" Section 73
Sale of Goods Act, 1930 â€" Section 47 (2), 54 (2)

Citation: (1991) ILR (Kar) 2563

Hon'ble Judges: N.D.V. Bhat, J; K.A. Swami, J

Bench: Division Bench

Advocate: H.R. Venkataramanaiah, for the Appellant; M.G. Sathyanarayanamurthy, for Respondent 1 and 2, for the Respondent

Final Decision: Dismissed

Judgement

K.A. Swami, J.
This Appeal is preferred against the Judgment and decree dated 10-8-1979 passed by the learned VIII Additional Civil

Judge, Bangalore City in O.S.No. 243/1976. The appellants are defendants 1 and 2. The respondents 1 and 2 are plaintiffs 1 and 2 and

respondent No. 3 is defendant No. 4.

2. Respondents 1 and 2 filed the aforesaid suit for recovery of a sum of Rs. 94,909-43 ps. from the defendants 1 to 4. We may also mention that

defendant No. 3 is not made a party to the Appeal because the suit has been decreed against defendant No. 3. Defendant No. 3 is a partnership

firm of which the 4th defendant who is 3rd respondent in the appeal is one of the partners.

3. The suit was based on the ground that the plaintiffs supplied certain goods to defendants 1 and 2 at the instance of defendant No. 4 who

represented to the plaintiffs as the partner of defendants 1 and 2. That defendants 1 and 2 received the goods and agreed to pay the price of the

goods after a certain date and thereafter did not pay the price of the goods and agreed to send in lieu of the price of the goods, another commodity

of the value; that the defendants also failed to supply the other commodity. Instead of that, the defendants had sent the very same commodity

which was sold by the plaintiffs to defendants. The plaintiffs refused to receive the same. However, as the same was sent through railway wagon, in

order to avoid demurrage, the goods were received and sold; that after the sale amount was adjusted towards the value of the goods sold by the

plaintiffs, it was stated by the plaintiffs in their plaint that a loss of Rs. 58,298-40 ps. had been caused to them. In addition to this the plaintiffs also

claimed interest on the value of the goods sent by them on 18-11-1979 pursuant to the earlier agreement and they have also claimed rebooked

railway fare, demurrage, octroi etc.

4. Defendants 1 and 2 filed written statement. The defendants 2 and 4 did not file any written statement. Defendants 1 and 2 denied the suit claim

and specifically contended that defendant No. 4 was not a partner of the defendants 1 and 2; that they had not entered into an agreement for

supply of goods to defendants 1 and 2. As such, they were not liable for the suit claim.

5. We have not stated the pleadings in detail because the trial Court has referred to them in a greater detail.

6. On the basis of the pleadings of the parties, the trial Court framed the following issues:-

1. Whether plaintiffs prove that defendants 1 and 2 through their partner Ramakrishna Baladeva placed orders for supply of paper?

2. Whether plaintiff delivered papers in pursuance of such order?

3. Whether there was privity of contract between plaintiffs and defendants 1 to 3?

4. Whether subsequently Ramakrishna Baladeva, partner of defendants 1 and 2 prevailed upon plaintiffs to accept supplies of papers

manufactured by West Coast Paper Mills and Andhra Paper Mills in lieu of payment of price for supply of suit consignment of paper?

5. Whether plaintiffs further prove that defendants 1 and 2 failed even to supply such paper?

6. Whether defendants 1 and 2 had asked the plaintiff to take back the paper supplied?

7. Whether defendants 1 and 2 had kept the paper sent by plaintiff with them at plaintiffs'' risk?

8. Whether this Court has no territorial jurisdiction?

9. Whether plaintiff resold the paper and incurred loss of Rs. 58,293-40 ps?

10. Whether the plaintiff is entitled to interest as claimed?

11. Whether plaintiff incurred freight and demurrage charges and octroi Rs. 4,726-40 and is entitled to claim the same?

12. To what relief?

7. The plaintiffs examined in support of their case two partners of the plaintiff''s firm as P.Ws.1 and 3, and a purchaser of the goods as P.W.2 and

also produced 53 documents which were marked as Exts. P-1 to P-53. The defendants 1 and 2 in support of their case examined one of the

partners of defendant No. 1 firm as D.W.1 and produced 4 documents which were marked as Exts. D-1 to D-4.

8. On consideration of the evidence on record, the trial Court answered the issues as follows:-

Issue No. 1: Plaintiffs have proved that defendants 1 and 2 through their partner Ramakrishna Baladeva placed order for supply of paper.

Issue No. 2: Plaintiffs have proved that in pursuance of such order, paper was supplied to defendants 1 and 2.

Issue No. 3: There is privity of contract between plaintiffs and defendants.

Issue No. 4: The fourth defendant did prevail on plaintiffs to accept paper supplied by the third defendant on behalf of defendants 1 and 2 in lieu of

the price of paper payable to defendants 1 and 2.

Issue No. 5: Defendants 1 to 3 have not supplied the paper as per agreement.

Issue No. 6: Defendants have failed to prove that they had asked the plaintiff to take back the goods.

Issue No. 7: Defendants 1 and 2 have failed to prove that they received and kept the goods on plaintiffs account at plaintiffs'' risk.

Issue No. 8: This Court has territorial jurisdiction to try this suit.

Issue No. 9: Plaintiffs have sustained a loss of Rs. 58,298.40 on the resale of goods.

Issue No. 10: Plaintiffs are entitled to interest on Rs. 1,30,808-80 from the date of transaction upto the date of redelivery to them on 23-9-1975 at

the rate of Rs. 13% p.a. and Rs. 58,298-40 ps. at Rs. 13% p.a. from 23-9-1975 till the date of suit.

Issue No. 11: Plaintiffs are entitled to recover from defendants 1 and 2 Rs. 4,486-15 ps.

Issue No. 12: As per the order.

Consequently, the trial Court decreed the suit of the plaintiffs against defendants 1, 2 and 4 for a sum of Rs. 80,328-59 ps. with costs and interest

on Rs. 58,298-40 ps. at 13 per cent per annum from the date of the suit till the date of decree and at the rate of 6 per cent per annum from the

date of the decree till the date of realisation of the suit claim.

9. Aggrieved by the aforesaid Judgment and decree, the defendants 1 and 2 have come up in appeal. Defendant No. 4, against whom the suit has

been decreed has not preferred any appeal.

10. Having regard to the contentions urged on both sides, the following points arise for consideration:

1. Whether the trial Court is justified in holding that Ramakrishna Baladeva placed orders for supply of paper as partner of defendants 1 and 2?

2. Whether the trial Court is justified in holding that there was a privity of contract between the plaintiffs and the defendants 1 and 2?

3. Whether the plaintiffs supplied paper pursuant to the order placed by Ramakrishna Baladeva?

4. Whether the plaintiffs had lien on'' the goods sent by the defendants 1 and 2 under railway receipt?

5. What is the effect of the sale effected by the plaintiffs of the papers sent by defendants 1 and 2 under the Exhibits P-25 to P-27?

6. Whether the suit is for recovery of the balance of the sale price of the goods sent by the plaintiffs to defendants 1 and 2 under Exts. P-1 to P-7

or for damages?

7. Whether the decree of the trial Court requires to be modified or set aside?

POINTS 1 to 3

11. Defendants 1 and 2 are the same firm viz., Sri Balaji Paper Agency, Gowligudda, Hyderabad which is arrayed as defendant No. 2. Defendant

No. 1 is nothing but a Branch Office of the defendant No. 2 Firm at Vijayawada.

12. The case of the plaintiffs is that Ramakrishna Baladeva, defendant No. 4 represented to Mittal, P.W.3, one of the partners of the plaintiffs''

Firm, when Mittal had been to Hyderabad in the month of October 1974 that he was a partner of Defendant No. 1 and 2 Firm and therefore, he

was entitled to enter into an agreement on their behalf. Hence he placed an order with Mittal for supply of papers. Accordingly, pursuant to the

said order, the plaintiff No. 1 sent the papers under the invoice Ext.P-5 and the Bill Ext.P-7 and so also plaintiff No. 2 sent the papers under

invoice as per Exts. P-1 to P-4 and the Bill marked as Ext. P-6 to defendants 1 and 2, and intimated defendants 1 and 2 on phone after the goods

were despatched. The further case of the plaintiffs is that the goods were not received by the defendants 1 and 2. On a further enquiry, the

plaintiffs were told by defendant No. 4 that defendants 1 and 2 were not in a position to pay the amount immediately and therefore they may be

granted some time and in the meanwhile, the Bank be intimated to release the goods to defendants 1 and 2 without payment. Accordingly, the

plaintiffs addressed letters-Exts. P-9 and P-10 to the Bank instructing the Bank to deliver the goods free of payment to defendants 1 and 2 and

also sent the copies of the Exts. P-9 and P-10 to defendants 1 and 2. Pursuant to this the Bank released the goods to defendants 1 and 2 and also

sent the documents Exts. P-11 to P-16 to the plaintiffs. The Bank obtained the acknowledgements from defendants 1 and 2 as per Exts. P-11 to

P-16 for having delivered the invoices without payment. Thereafter there was a demand made for giving credit to CST. Hence, the plaintiffs also

sent communications as per Exts.P-17 and P-18 giving credit to CST payable by defendants 1 and 2. Thereafter, the further case of the plaintiffs is

that the defendants 1 and 2 did not pay the price of the goods. Hence there was an alternative agreement entered into between the plaintiffs and

defendants 1 and 2 and 4 for supply of the West Coast Paper Mills of the value of the goods sent by the plaintiffs as per the bills Exts. P-6 and 7.

Pursuant to the alternative arrangement arrived at between the parties, the plaintiffs wrote Exts. P-19 and P-20 to defendants 1 and 2 to send the

papers of the West Coast Paper Mills of the value of the amount mentioned in Exts. P-6 and P-7. The further case of the plaintiffs is that even

though the alternative arrangement was arrived at, defendants 1 and 2 did not send the papers of the West Coast Paper Mills, but they sent back

the very same papers which were sent under Exts. P-1 to P-5 and P-6 and P-7. Therefore, the plaintiffs did not receive those goods and returned

the railway invoices to defendants 1 and 2 and defendants 1 and 2 refused to receive the same and returned them. Therefore, in order to avoid

demurrage, they received and sold them to P.W.2 and others and as a result thereof, loss incurred to them was to the tune of Rs. 58,298-40.

13. It may be mentioned at this stage that the amount of Rs. 58,298-40 claimed as loss by the plaintiffs is the amount which is arrived at after

deducting the amount of sale of the goods returned by defendants 1 and 2 in the sale price of the goods supplied to defendants 1 and 2 under Exts.

P-1 to P-7. As to what is the effect of this will be considered while considering the issue as to whether the suit is for recovery of damages.

14. On the contrary, the defendants 1 and 2 denied the case of the plaintiffs and contended that defendant No. 4 was not a partner of the

defendant No. 2 Firm and he was not authorised to place orders on behalf of defendant No. 2. As such, they were not liable for the suit claim. It

may also be mentioned that defendants 1 and 2 did not put forth any counter claim regarding the sale of the goods sent by them under Exs. P-25 to

P-27 nor did they challenge the legality, correctness or bona fides of the sale of the papers effected by the plaintiffs which were sent to them under

Exs.P-25 and P-27.

15. The evidence on record as referred to by the learned trial Judge and also as read to us clearly establishes that when Sri Mittal went to

Hyderabad in the month of October, 1974, defendant No. 4 who was a well known paper merchant represented to Sri Mittal (P.W.3) that he was

a partner of defendant No. 2 firm and as such was entitled to place orders. Hence, the papers be sent to defendants 1 and 2. P.Ws.1 and 3 have

specifically stated that defendant No. 4 was specifically asked as to why the goods should be sent to defendants 1 and 2 when the order was

placed by defendant No. 4, and to that, the defendant No. 4 replied that he was a partner of defendants 1 and 2 and defendants 1 and 2 and

defendant No. 3 are sister concerns and therefore, he was entitled to place orders. We may also mention at this stage that the two firms viz.,

defendants 2 and 3 consisted of the partners belonging to the same family. Gopikrishna and Srikantha Devi according to D.W.1 - Rajagopal are

the partners of Defendant No. 2 firm. The evidence has also come on record, that Gopalakrishna is no other than the father of Rajagopal. Smt.

Srikanthadevi is no other than the wife of defendant No. 4. The partners of defendant No. 3, firm are Ramakrishna Baladeva and Satyanarayana

Baladeva. Thus the partners of defendants No. 2 and 3 firm are no other than the members of the same family and they are the children of

Gopikrishna and his daughter-in-law.

16. Under these circumstances, it is the case of the plaintiffs that they believed the representation made by defendant No. 4 that he was the partner

of defendant No. 2 Firm and as such he was entitled to act on behalf of defendant No. 2 firm. In addition to this, it is also established in this case

that pursuant to the order placed by defendant No. 4, the goods were sent to defendant No. 2 firm at Hyderabad and the same were received by

defendants 1 and 2 after availing the concessions shown by the plaintiffs regarding payment of the amount on obtaining some time for payment of

the value of the goods. Exts. P-9 and P-10 clearly go to show that the plaintiffs instructed the Bank that the goods could be delivered to

defendants 1 and 2 free of payment. On delivering the goods to defendants 1 and 2, the Bank obtained acknowledgements from defendants 1 and

2 and sent them to the plaintiffs as per Exts. P-11 to P-16. Thus, it may be mentioned here that the defendants 1 and 2 did not raise any objection

at any stage nor did they write to the plaintiffs that defendant No. 4 was not a partner of the firm and he was not entitled to represent defendant

No. 2 firm. On the contrary the goods sent pursuant to his order (placed by defendant No. 4) were received without raising any objection. The

evidence on record also establishes the case of the plaintiffs that as the defendants 1 and 2 failed to pay the amount, defendant No. 4 as a partner

of defendant No. 3 made alternative arrangement for payment of the amount and requested the plaintiffs to place an order for supply of West

Coast Paper of the value of the goods sent under Exts. P-1 to P-7 to defendants 1 and 2 and they would supply the goods. Accordingly, the

plaintiffs wrote letters to defendants 1 and 2 to supply the papers of West Coast Paper Mills as per Exts. P-19 and 20. At this stage also, the

defendants 1 and 2 did not raise any objections, and did not put forth any case that there was no contractual relationship between defendants 1

and 2 and the plaintiffs and defendant No. 4 was not concerned with the defendant No. 2 firm. In addition to this, when Sri Rajagopal was in the

witness box, he specifically stated that defendant No. 4 was not a partner and he would produce the partnership deed but he did not produce the

partnership deed which would have set at rest the controversy beyond doubt,

17. On a request to supply the names of the partners, the Registrar of Firms refused to issue the same as the partnership deed was with defendant

No. 1. It was the case of the defendants 1 and 2 that defendant No. 4 was not the partner and as such, he was not entitled to act on their behalf.

Therefore, it was all the more necessary for defendants 1 and 2 to produce the partnership deed, but they did not produce it. Therefore, on taking

into consideration all these aspects of the case and the failure on the part of defendants 1 and 2 to produce the deed of partnership and also to

disown the contractual relationship between the plaintiffs and defendants 1 and 2 at the appropriate time, we are of the view that the evidence on

record clearly establishes that defendant No. 4 was the partner of defendant No. 2 firm and acted as such.

18. At this stage, we may also refer the following circumstance that defendant No. 4 is a close relation of partners of defendant No. 2 firm. That

there is no reason as to why the defendant No. 4 could tell a lie to the plaintiffs that he was a partner of the defendant No. 2 firm if really he was

not one such. That defendants 1 and 2 took delivery of the goods sent under Exts. P-1 to P-7; that defendant No. 4 pleaded that defendants 1 and

2 requested for granting time to pay the amount and to instruct the Bank to deliver the goods free of payment; that defendant No. 4 did not file the

written statement and did not step into the witness box; that the partnership deed was not produced which was admittedly in the custody of

D.W.1, Rajagopal.

19. At this stage, Sri Venkataramanaiah, learned Counsel for the appellants contended that the burden was upon the plaintiffs to obtain the

Registration certificate from the Registrar of Firms and produce the same. As the plaintiffs have failed to produce the registration certificate and it is

the registration certificate which alone could prove as to who were the partners of Defendant No. 2 Firm. That in the absence of the documentary

evidence, any amount of oral evidence was of no avail. Hence, the Court below was not justified in holding that defendant No. 4 was a partner of

defendant No. 2 Firm and acted on behalf of defendant No. 2 Firm. At this stage, it is relevant to notice the Decision of the Supreme Court in AIR

1968 SC 14131, The relevant portion of it is as follows:

He also conceded that there is one public tank known as Chasmvachi Vihar near the Dargah and there are 5 wells near the Dargah and five

boundary Aranas about one mile from the Dargah. Lastly reference should be made to the important circumstance that the appellant has not

produced the account of the Dargah income. In the course of his evidence, the appellant admitted that he was enjoying the income of plot No. 134

but he did not produce any accounts to substantiate his contention. He also admitted that he had got record of the Dargah income and that account

was kept separately. But the appellant has not produced either his own accounts or the accounts of the Dargah to show as to how the income from

plot No. 134 was dealt with. Mr. Gokhale however argued that it was no part of the appellant''s duty to produce the accounts unless he was called

upon to do so and the onus was upon the respondents to prove the case and to show that the Dargah was the owner of the plot No. 134. We are

unable to accept this argument as correct. Even if the burden of proof does not lie on a party, the Court may draw an adverse inference if he

withholds important documents in his possession which can throw light on the facts at issue. It is not in our opinion a sound practice for those

desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon

the issues in controversy and to rely upon the abstract doctrine of onus of proof.

20. Therefore, it was all the more necessary for the defendants to produce the partnership deed. Having failed to produce the partnership deed, it

does not lie in the mouth of the defendants to contend that it was for the plaintiffs to have called upon the defendants to produce the deed when it

was the specific case of the defendants themselves that they had the partnership deed with them and defendant No. 4 was not a partner of

defendant No. 2 firm which fact would have been proved by the mere production of the partnership deed. Therefore, we have been left with no

option but to draw an adverse inference against the defendants, in the light of the Gopalakrishnaji Ketkar v. Mohammed Haji Latif several other

facts proved to which a reference has already been made in the preceding paragraphs, that if the partnership deed had been produced, it would

have gone against the defendants.

21. The documents produced at Exts. P-1 to P-11 and also P-16 to P-17 would go to show that the goods were sent by the plaintiffs pursuant to

the order placed by Ramakrishna Baladeva and the same were received by defendants 1 and 2. Privity of contract between the plaintiffs and

defendants 1 and 2 is proved not only because of the fact that defendant No. 4 was a partner and he placed the order as a partner of defendant

No. 2 firm but also in view of the fact that the goods sent pursuant to the order placed by Ramakrishna Baladeva were received by defendants 1

and 2. Hence, the Points 1 to 3 are answered as follows; The trial Court was justified in holding that Ramakrishna Baladeva was partner of

defendant No. 2 firm and acted as such. The plaintiffs were well within their knowledge and acted lawfully in sending the goods to defendants 1

and 2 pursuant to the order placed by Defendant No. 4 as partner of Defendant No. 2 firm. The trial Court was justified in holding that there was a

privity of contract between the plaintiffs and defendants 1 and 2 and 4 and the goods were supplied by the plaintiffs pursuant to the order placed

by defendant No. 4 as partner of defendant No. 2 firm and the same were also received by defendants 1 and 2.

POINT NO.4:

22. The contention of Sri Venkataramanaiah, learned Counsel for the appellants is that defendants 1 and 2 received the goods at the instance of

the plaintiffs on an understanding that the goods were to be retained by them as agents of the plaintiff and therefore, they received the goods and

retained them and thereafter sent them back to the plaintiffs. This contention in the light of the finding recorded on Points 1 to 3 cannot at all be

accepted, because at no point of time, defendants 1 and 2 raised any objections either regarding the order placed by defendant No. 4 for supply

of papers or at the stage of receiving the goods. It is next contended that even if it is accepted that the goods were received by defendants 1 and 2

pursuant to the order placed by them through defendant No. 4, the plaintiffs were the unpaid sellers because no amount was paid towards the

value of the goods sent under Exts. P-1 to P-7. That in such a situation when defendants 1 and 2 sent back the goods, and the same were received

by them, the possession of the said goods by the plaintiffs was no other than that of a bailee and as such, they had a lien on the goods. Hence the

provisions of Sections 47(2) and 54(2) of the Sale of Goods Act were attracted. Therefore, it was necessary for the plaintiffs to issue a notice to

defendants 1 and 2 before selling the goods. As the plaintiffs did not issue any notice, they were not entitled to damages as claimed in the suit; in

view of the specific provision contained in Section 54(2) of the Sale of Goods Act. It appears to us that it is not possible to accept this contention.

It may be pointed out that no such plea has been raised in the written statement and no issue has been raised. In the written statement, neither the

validity of the sale has been challenged nor the authority of the plaintiffs to sell the goods returned under Exs.P-25 and P-27 is challenged. The

correctness and the propriety of the sale is also not challenged by the defendants. In the written statement, defendants 1 and 2 have pleaded as

follows:

It is submitted that plaintiffs having received back the goods and having dealt with the said goods at their own choice and will, it is travesty of truth

to claim a sum of Rs. 58,298-40 ps. as loss on resale and the purported interest, freight charges, demmurage, clearing charges, octroi and the like.

Indeed plaintiffs themselves are due in a sum of Rs. 3,452/-, representing the godown rent and the ""coolie"" and ""Hamali"" charges for which these

defendants will reserve their rights to institute separate proceedings. The claim of plaintiffs is just an attempt as to counter to the claims of these

defendants in regard to the rent and the like.

23. In order to attract the provisions of Sections 47(2) and 54(2) of the Sale of Goods Act, it is necessary that a seller must be an unpaid seller

and he must have been in possession of goods. In the instant case, there is no doubt that the seller is an unpaid seller because the plaintiffs had not

been paid the value of the goods sent by them under Exs.P-1 to P-7. But the plaintiffs cannot be held to be the persons in possession of the goods

as they parted with the possession of the goods when the same were delivered to the defendants by the Bank on the instructions of the plaintiffs.

Pursuant to the order, the plaintiffs sent the goods to defendants 1 and 2 under Exs.P-1 to P-7. The invoices were sent to the Bank. The

defendants 1 and 2 were required to pay the amount and obtain the invoices and take delivery of the goods from the railway. But they did not do

so. They, through defendant No. 4 sought for delivery of the goods free of payment as they were not in a position to pay the amount immediately.

The plaintiffs hence instructed the Bank to handover the invoices free of payment, as per Exs.P-9 and P-10. Accordingly, the Bank delivered the

invoices free of payment after obtaining acknowledgements from defendants 1 and 2 as per Exs.P-11 to P-16 and sent them to the plaintiffs. Thus,

the sale transaction on the delivery of the goods to the defendants 1 and 2 stood completely performed, not only the property in the goods passed

on to the defendants 1 and 2 but the possession of the goods was also delivered to them. The unpaid seller''s lien continues even after passing of

the goods to the purchaser, as long as the unpaid seller continues to remain in actual possession of the goods sold. In the instant case, both the

things were not there inasmuch as the goods were delivered to the defendants 2 and 4 free of payment on the instructions of the plaintiffs, as per

Exs.P-11 to P-16. Once the unpaid seller loses the actual possession of the goods, he loses his lien.

24. In Maneckji v. Wadilal AIR 1926 PC 38 and Company it is observed thus:

In the first place, so far as lien is concerned, the law as to lien is statutory and is contained in the 95th and following Sections of the Indian

Contract Act. Section 95 applies to this case; unless there is possession, there is no lien.

It is also relevant to notice the statement made in Maneckji''s case with reference to the facts of that case which is as follows:

. ""Here the goods were not ascertained goods at the time of the contract, so soon, therefore, as Arajania, acting for Bharucha, handed Gora the

certificates and transfers, and Gora accepted them and gave the cheque, the goods became ascertained goods, the sale was complete and the

property passed. From that time onward Bharucha and Arajania could only sue Gora on the cheque, or for the price of the shares unpaid in

respect that the cheque had not been honoured. They had no longer any jus in re of the certificates and transfers. They had no statutory lien, for

they had parted with possession, and, consequently as they had no contract with Defendants Nos. 2 and 3, they could not sue them for delivery of

the shares, whether the defendants had got good title as against Gora or had not.

We may also refer to the statement of law made in Benjamin''s Sale of Goods, Third Edition, based on the several authoritative pronouncements.

At para 1217, it is stated thus:

No power to terminate the contract or to retake where both property and possession in the buyer. Where, following the contract of sale, the

buyer has both possession of, and the property in, the goods, any retaking of the goods by the unpaid seller will (except in cases of fraud or

misrepresentation) be a conversion against the buyer.

In the same para, it is further stated thus:

The assumption behind the statutory rules on the unpaid seller''s rights of lien or of stoppage in transit is that if the property has passed to the

buyer and the goods themselves have reached the actual, possession of the buyer or his agent, the unpaid seller has no further remedy against the

goods; if the seller had a common law power of revisiting the property in himself by terminating the contract even where the buyer had lawfully

obtained both the property in, and possession of, the goods the statutory restrictions on the remedies of lien and stoppage could be easily evaded.

Benjamin considered that: Whenever the property has passed and the goods have reached the actual possession of the buyer, the seller''s sole

remedy is by personal action. He stands in the position of any other creditor to whom the buyer may owe a debt; all special remedies in his favour

qua seller are gone.

25. However, it is the contention of Sri Venkataramanaiah, learned Counsel for the appellants that when the goods were redelivered to the

plaintiffs, the possession of the said goods by the plaintiffs was that of a bailee and therefore, lien was revived and it was to meet such cases,

Section 47(2) was enacted. The learned Counsel placed reliance on the observations contained in a case in which it was stated that Section 47(2)

was nothing but a declaration of law which follows as a result of unpaid seller becoming a bailee. In the facts and circumstances of the case, it is

not possible to hold that the taking possession of the goods by the plaintiffs sent by defendants 1 and 2 under Exts. P-25 and P-27 was that of a

bailee. Section 148 of the Contract Act defines ""Bailment"". A ''Bailment'' is the delivery of goods by one person to another for some purpose upon

a contract that they shall when the purpose is accomplished be returned or otherwise disposed of according to the directions of the person

delivering them. The person delivering the goods is called the ''bailor''. The person to whom they are delivered is called the ''bailee''.

Explanation: If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the

owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.

The Explanation is not relevant for our purpose because this is a case in which the goods were sent by defendants 1 and 2 to the plaintiffs.

Therefore, it has to be seen whether the goods which were sent by defendants 1 and 2 under Exts. P-25 and P-27 were pursuant to a contract

entered into by the plaintiffs and defendants 1 and 2. No such case is pleaded by defendants 1 and 2. On the contrary, the evidence discloses that

there was an arrangement agreed upon by the plaintiffs and defendants 1 to 4 that in lieu of the value of the goods sent by the plaintiffs to

defendants 1 and 2 as per Exts. P-1 to P-7, defendants 1 and 2 shall send the papers of the West Coast Paper Mills of the value of the goods sold

to them. Instead of sending those papers, the defendants 1 and 2 sent back the very same goods which were sent by the plaintiffs under Exts. P-1

to P-7 without any agreement of bailment. The plaintiffs did not receive them. They sent back the railway receipt to defendants 1 and 2. But

defendants refused to receive the railway receipts and they returned them. In the circumstances, the plaintiffs received the goods and intimated the

defendants that the same were received in order to avoid demurrage charges. Thus, this is a case in which it can be said that the goods were laid at

the door of the plaintiffs forcibly without any bailment. In the circumstances, it is not possible to hold that the plaintiffs were liable to hold the goods

as a bailee. The stage at which the goods were sent under Exs. P-25 and P-27, the relationship of the plaintiffs and defendants 1 and 2 was only

that of a creditor and a debtor because after the goods were delivered to defendants 1 and 2 on credit, the defendants 1 and 2 were only under an

obligation to pay the value of the goods. In such a situation, when the plaintiffs came in possession of the goods sent by defendants 1 and 2 and

sold them in order to avoid demurrage, and dissipation of goods such a sale did not attract the provisions of Section 47 or 54 of the Sale of Goods

Act. Therefore, it could not be termed as the one effected in exercise of the right of lien. We have already pointed out that the plaintiffs lost the lien

when they delivered the goods to defendants 1 and 2 on credit and entered into an alternative arrangement for payment of the value of the goods.

In the eye of law the goods that were sent by defendants 1 and 2 were not the same goods which were sent by the plaintiffs to defendants 1 and 2;

because the goods were no more of the ownership of the plaintiffs. Therefore, the sale in question effected by the plaintiffs at the most amounted to

conversion of the goods of defendants 1 and 2. Whether that conversion was within the power of the plaintiffs or in accordance with law or it was

proper, and whether the sale was conducted on taking all precautions as a reasonable seller would take, are questions which could be gone into

only when there is a claim made by defendants 1 and 2 for recovery of the value of the goods. It is also necessary to point out that it is not the case

of the defendants that there was any foul play in the sale effected by the plaintiffs. It is also the proposition of law made in Benjamin"s Sale of

Goods - Third Edition, at para 1223/1423. As the defendants 1, 2 and 4 were due to pay the value of the goods sent by the plaintiffs under Exs.P-

1 to P-7, the plaintiffs were entitled to adjust the sale proceeds towards the price payable by the defendants 1, 2 and 4 in respect of the goods

sold to them as per Exs.P-1 to P-7.

26. We have already pointed out that there is no such claim made by the defendants by way of a counter claim. Therefore, we do not consider it

necessary to go into the contentions urged by Sri Venkataramanaiah, learned Counsel for the appellants, that the goods should have been sold by

public auction after notice to defendants. We have also already pointed out that the propriety of the sale is not challenged and it is not the case of

the defendants that there was any foul play in the sale held by the plaintiffs. At this stage, it may be relevant to notice a Decision of the Bombay

High Court in Kishinchand Chellaram Vs. Vishandas Amarnath, In that case, the plaintiffs sold 15 bales to the defendants and delivered them.

However, the defendants informed the plaintiffs that the bales had been sent without any tickets; that the person to whom they had sold the bales

had served on them that the bales in question were without tickets and that therefore they refused to take delivery. Hence, the defendants

compelled the plaintiffs to take back the 15 bales. On the contrary, the plaintiff called upon the defendants to pay a sum of Rs. 74,256-60 being

the price of the 15 bales. The defendants denied the liability to pay and returned the bales to the plaintiffs. The plaintiffs sold all the 15 bales in

public auction. As a result of the said sale, a sum of Rs. 54,001-14-6 was realised. After deducting the auctioneers" commission, the net proceeds

came to Rs. 53,461-14-6. The plaintiffs filed the suit to recover balance of the amount due by the defendants to them. It was held thus:

In my opinion Clauses 3, 7 and 9 have no application to the facts of this case. In my opinion this is not a suit to recover the deficiency in price on

the footing of a re-sale as referred to in Sections 46 and 54, Sale of Goods Act. Sections 46 and 54 contemplate that the unpaid seller of goods

has not parted with possession thereof to the purchaser and that he has, therefore, a lien on the goods sold and while he is in possession of them,

he has got the right of resale. Those Sections do not contemplate the case where the purchaser has already taken delivery of the goods. The

possession then is with the purchaser, and it is not transferred to the vendor by the purchaser subsequently leaving the goods at the vendor''s door.

In such cases the vendor has neither the right (except at the request of the purchaser) nor the duty to resell the goods. If the vendor disposes of

those goods, he is liable on the footing of conversion.

What then is the position in reference to these goods in which the property had in my opinion passed to the defendants and which they had no right

to reject? The defendants left the 10 bales opposite the plaintiffs'' shop on the pavement against the plaintiffs'' will. Instead of allowing these goods

to perish and go waste, the plaintiffs got them sold by public auction along with the other 5 bales after notice to the defendants and on defendants''

account. That action of the plaintiffs may be justified or not, but that sale was not a resale as contemplated by the contract or by the Sale of Goods

Act. The plaintiffs'' liability being in the nature of liability arising on conversion, the plaintiffs, in my opinion, are liable to account to the defendants

for such price as fairly represents the value of the goods at the date of the sale, and no more, especially in a case like this, where the plaintiffs had

no other course left open to them.

XXX XXX XXX

XXX XXX XXX

As regards issue No. 5, the re-sale was not a re-sale within the meaning of the sale of Goods Act. But the actual re-sale as it took place is binding

on the defendants in the sense that the price realized at the resale was a fair price. I answer issue No. 5 in the affirmative.

So far as the claim for interest is concerned, the Sale of Goods Act, Section 61, applies. I, therefore, award the plaintiffs interest but at the rate of

6 per cent only instead of at the rate of 9 per cent as claimed by the plaintiffs.

The aforesaid decision in Firm Kishinchand''s case squarely applies to the facts of the present case. The present case is also a case in which the

purchaser having taken delivery of the goods, subsequently left the goods at the door of the sellers against their will. No doubt, the plaintiffs had no

right or duty to sell the goods, but they did so in the interest of the defendants to avoid demurrage and also to save the goods from being

dissipated. They were, as already pointed out, entitled to adjust the sale proceeds in the price payable by defendants 1, 2 and 4 to the plaintiffs in

respect of the goods sold to them by the plaintiffs.

26.1. However the learned Counsel for the appellants placed reliance on a Decision reported in Sital Prasad Vs. Ranjit Singh and Others, That

was a case in which a suit for damages consequent upon a breach of contract relating to the purchase of two grain pits was filed on the allegations

which the defendants did not dispute; that the latter had Sital Prasad v. Ranjit Singh and Ors. agreed to purchase the two grain pits at certain rates,

and that certain money had been duly paid; but the defendants failed to pay the balance on the price and take delivery within the stipulated period.

Further, the case of the plaintiffs was that as the buyer failed in his obligation as to payment and delivery on due dates, they were entitled to resell

the grain pits according to the market rate and that accordingly the plaintiffs resold the grain pits, which resulted in a loss to the plaintiffs. Hence,

the plaintiffs filed the suit for damages. There was a specific defence put up by the defendants that as the plaintiffs had a lien on the grain pits which

continued in the actual possession of the plaintiffs, on the failure to pay the value and take delivery of the goods by the defendants, the plaintiffs

could not have sold the same without notice to them and therefore, the plaintiffs were not entitled to claim damages. The Court upheld the

contention because no notice was issued to the plaintiffs. There cannot be any dispute with regard to the proposition laid down in the aforesaid

case because it was a case in which the sellers had not parted with the actual possession of the goods. We have already pointed out that the

unpaid seller''s lien continues as long as he continues to remain in actual possession of the goods sold. Therefore, in such a situation, the seller has

to issue notice as required under the Sale of Goods Act intimating the defendants that the goods would be sold. In the absence of issuing of any

such notice, it would disentitle him to claim damages. Such a situation did not exist in the instant case and this aspect, we have already adverted to

in the preceding paragraphs of this Judgment. Therefore, it is not possible to apply the decision in Sital Prasad''s case. Hence, Point No. 4 is

answered in the negative.

POINT NO. 5

27. The sale of the goods which were received by the plaintiffs under Exs.P-25 and P-27, was not in the exercise of the alleged lien as contended

by the defendants, but it was the sale of the goods belonging to defendants 1 and 2. Whether such a sale was valid or proper, as already pointed

out is not required to be gone into in this case because the defendants have not made any claim in that regard. Under these circumstances, the only

effect of the sale held by the plaintiffs is to enable them to adjust sale proceeds towards the amount payable by defendants 1, 2 and 4 in respect of

the goods supplied by them to defendants 1 and 2 as per Exs.P-1 to P-7. It is sufficient to point out that the sale of the goods in question did not

attract either Section 47(2) or Section 54(2) of the Sale of Goods Act because it was not in exercise of the right of lien of an unpaid seller as no

such right was available to the plaintiffs. Hence, Point No. 5 is answered accordingly.

POINT NO. 6

28. The contention of the learned Counsel for the appellants is that when the plaintiffs have specifically made the claim as loss on resale, the suit is

nothing but the one for recovery of damages u/s 73 of the Contract Act. In order to determine, as to whether the suit is for recovery of the

damages, u/s 73 of the Contract Act or it is the one for recovery of the value of the goods sold, it is the substance of the plaint that has to be

looked into. The amount claimed under the heading Loss on resale is the amount which is equivalent to the balance of the sale price of the goods

supplied by the plaintiffs to defendants 1 and 2 under Exs.P-1 to P-7 after deducting the sale proceeds of the goods sent by the defendants 1 and

2 to the plaintiffs under Exs.P-25 and P-27. In the case of damages, it would not be a suit for recovery of the sale price or the balance of the sale

price, but it would be a suit for recovery of the loss caused by reason of the breach of the contract and resale of the goods. The amount payable

by way of damages may not be equivalent to the balance of the amount payable towards the value of the goods sold. It may be more or it may be

less depending upon the market price prevailing at the relevant point of time. As the plaintiffs have claimed the balance amount of the value of the

goods sold, it is nothing but a suit for recovery of the sale price. Therefore, we are of the view that the suit in substance is the one for recovery of

the balance of the value of the sale price of the goods sold to defendants 1, 2 and 4 under Exs.P-1 to P-7. Hence, the question of applying the

principles embodied in Section 73 of the Contract Act does not arise. The point No. 6 is answered accordingly.

29. Regarding the correctness of the amount arrived at by the trial Court, no contention is urged. Therefore, we do not consider it necessary into

the correctness of the amount for which the trial Court has passed the decree.

30. The trial Court has awarded interest at 13 per cent though the plaintiffs have claimed interest at 18 per cent. It is contended on behalf of the

appellants that the plaintiffs are not entitled to interest because the suit is for recovery of damages and the payment of interest on the damages

would arise only on determination of the damages and not earlier to that. It is not possible to accept this contention. We have already pointed out

that the suit is not for recovery of damages. It is the one for recovery of the balance of amount of the value of the goods sold to defendants 1, 2

and 4 under Exts. P-1 to P-7. Therefore, in such a case the purchaser becomes liable to pay the interest according to the terms of the agreement

or from the date it is demanded. In the instant case, the plaintiffs while intimating the defendants as per Exts. P-19 and P-20 for supplying the

paper of West Coast Mills or Andhra Paper Mills to them in lieu of the sale price, specifically stated that the amount will be adjusted against the

above referred dues thus:

Dear Sirs,

This has reference to the discussions the undersigned had with your Mr. Ramakrishna Baladeva in connection with the payment of Rs. 87,778-85

against our supply of paper vide our Bill Nos. 261, 262, 263 and 264. Your Mr. Ramakrishna Baladeva informed that he is not able to make

payment by cash or draft immediately. He has agreed to supply the goods manufactured by M/s. West Coast Paper Mills/Andhra Paper Mills and

for the supplies he has agreed to send the documents direct and the amount of the supplies will be adjusted against above referred dues. The

undersigned has agreed and accepted his proposals and accordingly we are placing herewith the following orders which may please be despatched

positively during the month of March/April 1975 from Mills at Mill cost plus C.S.T. at 3%. The above arrangements is only to collect our long

outstandings from you. If you fail to supply the goods before 30th of April we will be free to enforce our claim against our Bill No. 261, 262, 263

and 264.

1) S.S.W Pulp Board 22 x 26/10 Kg - 2 Tons

2) - "" - 22 x 28/9.2 Kg - 3 Tons

3) - "" - 22 x 28/8.6 Kg - 2 Tons

4) B.S.W. Maplitho 23 x 36/1 8.6 Kg - 2 Tons

5) - "" - 23 x 36/21.3 Kg - 2 Tons

6) White Creamwove 23 x 36/16 Kg - 2 Tons

13 Tons

You may please despatch the above goods and invoice on us. The goods may please be despatched to Bangalore City by Goods Train under

separate R/S for each items.

The above order has been conveyed to your Mr. Ramakrishna Baladeva ever phone.

Kindly confirm per return the above arrangement. Thanking you,

Yours faithfully,

for Bangalore Paper and Board Co.,

Sd/-

(G.N. Mittal) Partner.

31. In the Bills Exts. P-5 and P-6, it is specifically stated that interest will be charged at the rate of 13 per cent per annum if not paid on

presentation. The plaintiffs sent the goods pursuant to the agreement of sale on a condition that they would be entitled to charge interest at the rated

of 13 per cent per annum in the event of non-payment of the sale price on presentation of the Bills. On taking into consideration Exts.P-5 and P-6,

the learned trial Judge has awarded interest at 13 per cent from 18-11-1974, the date on which the plaintiffs delivered the goods to defendants 1,

2 and 4 till 23-9-1975, the date on which the goods were sold by the plaintiffs and on the balance amount of Rs. 58,298-40 ps. at the rate of 13

per cent from the date of suit till the date of decree. It is not possible to hold that the learned trial Judge has erred in awarding interest. When once

it is held that the suit is for recovery of the balance of the sale price, the plaintiffs are entitled to the interest from the date the amount became due.

Consequently, Sub-section (1) of Section 61 of the Sale of Goods Act is attracted which enables the Court to award interest to the seller in a suit

for the amount of the price from the date of the tender of the goods or from the date on which the price was payable. In the instant case, there is a

contract as contained in Exs.P-4 and P-6. Therefore, the interest awarded by the trial Court cannot be held to be in contravention of Section 61(2)

of the Sale of Goods Act.

32. In the light of the findings recorded on points 1 to 6, the total denial of the suit claim becomes unsustainable. It is also relevant to notice that

defendant No. 4 who is one of the partners of defendant No. 2 Firm against whom a decree is passed has not chosen to prefer any appeal. As

such, he is not aggrieved by the decree passed by the trial Court.

33. For the reasons stated above, point No. 7 is answered in the negative. Consequently, the appeal fails and the same is dismissed with costs.