(1990) 09 KL CK 0027

High Court Of Kerala

Case No: S.A. No. 299 of 1984

D.V. Deo — APPELLANT

Vs

M.M. Abdul Hameed and Sons — RESPONDENT

Date of Decision: Sept. 10, 1990

Acts Referred:

- Sales of Goods Act, 1930 - Section 43

Hon'ble Judges: S. Padmanabhan, J

Bench: Single Bench

Advocate: S. Parameswaran and K. Sikhivahanan, for the Appellant; S. Narayanan Poti and S. Remash Babu, for the Respondent

Judgement

Padmanabhan, J.

Decree for realisation of the price of palmarosa oil Supplied by the Respondent-Plaintiff is challenged in this appeal by the Defendant.

2. Both Plaintiff and Defendant are partnership firms dealing in oils and perfumes. They were having good personal and business relationship. In June 1980, Defendant collected sample of palmarosa oil from the Plaintiff through its agent and got satisfied of its quality by testing. On 23rd August 1980, Defendant ascertained from the Plaintiff over phone about the availability of 167.3 kgs. of palmarosa oil and its willingness to sell it for Rs. 142.80 per kg. The same day, Defendant sent its driver with car and carboys and collected the oil which was taken to its premises. Bill was sent on the same day by post and it was received by the Defendant on 25th August 1980. On 26th August 1980, Defendant sent Ext. A-7 letter rejecting the simply without assigning any reason. When Plaintiff objected in its letter Ext. A-8 dated 27th August 1980, the Defendant replied by Ext. A-9 dated 28th August 1980 stating that the bulk is substandard. On 29th August 1980,'' Plaintiff again sent Ext. A-10 reiterating its stand and demanding the price- Then Exts. A-11 and 12 letters were sent by the Defendant on 30th August 1980 and 3rd September 1980 asking the Plaintiff to take back the goods and informing that it does not conform to the

sample. These are the circumstances under which the suit was filed.

3. This is admittedly a case of sale by sample. The main dispute between the parties is whether the bulk supplied conforms to the sample or not and consequently, whether there is liability to make payment or not. When the contract is by sale of goods by description, there is an implied condition that the goods shall correspond to the description and if the contract is for sale by sample, there is the implied condition that the bulk corresponds with the sample in quality. So also, the buyer shall have reasonable opportunity of comparing the bulk with the sample. The property in the goods is transferred to the buyer at such time as the parties to the contract intended it to be transferred. Intention has to be gathered from the terms of the contract, the conduct of the parties and the circumstances of each case. In the absence of intention to the contrary, when, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or bailee for transmission to the buyer and the buyer does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. The seller is only bound to give a reasonable opportunity to the buyer to examine the goods not previously examined. It is for the buyer to decide whether he has to examine or not. He can waive his right of examination and accept delivery. After waiving right of examination and taking delivery of the bulk, the buyer may not be entitled to reject the goods on the ground that they do not conform to the sample. Sale of goods by sample is also sale by visual description probably because physical description by looking at the sample is not possible. Even when the bulk corresponds to the sample, the buyer can reject the bulk for latent defects rendering the goods unmerchantable. But such a contention is not there in this case. Therefore, the two questions to be considered in this case are whether the bulk corresponds to the sample and if not, whether such a plea is now not available to the Defendant on the ground that he had a reasonable opportunity of comparing the bulk with the sample, but he did not do so.

4. The provisions of Section 43 of the Sale of Goods Act entitling the buyer to refuse to accept the goods and his immunity from sending the goods to the seller are applicable only when the goods are delivered to the buyer by the seller. This is a case in which the Appellant sent its driver with car and carboys and collected the bulk which was taken to its premises. There is no case that no opportunity for comparison of the bulk with the sample was given when delivery was taken. If so, it must be considered that the right was waived and it is no more available. The seller is not bound to go and collect the goods at any rate. The buyer must return if he is entitled to reject.

5. The case of the Appellant is that when it tested the sample in June 1980, it was found to contain 94.66 per cent geraniol. But, according to it, when the bulk was tested at its premises on 23rd August 1980, it was found to contain only 88.45 per cent of geraniol and there was also 3.44 to 3.5 per cent of adulterant aldehyde. The

first contention of the Respondent is that the alleged testing on 23rd August 1980 is a myth and secondly, that it has no legal effect. Inspection of the bulk, in order to ascertain whether it conforms to the sample, must be had at the time and place of delivery, unless the buyer reserves the right of inspection to be had elsewhere or the contract provides otherwise. Appellant has no case that reasonable opportunity was not given for inspection or that it reserved its right to inspect elsewhere. These are all subject to the terms of the contract to contrary, but no such term is alleged. Therefore, when delivery was taken without inspection, the right for inspection must be deemed to have been waived. After taking the bulk to its premises, in such a situation, the Appellant cannot have a unilateral inspection to see whether the bulk conforms to the sample. Such an inspection cannot bind the seller and it cannot have any legal consequence.

6. On the merits, it is doubtful whether the Appellant really had a testing, as alleged on 23rd August 1980 by which it got the result now claimed by it. In Ext. A-7 letter sent by it, the Appellant did not assign any reason at all for rejection. In Ext. A-8 sent on 28th August 1980, it only said that the bulk is substandard. The Appellant did not say that it does not conform to the sample. The percentage of geraniol in the sample or the bulk was not: stated and there was no mention that there was any adulterant. The real question was not whether the bulk was substandard or not. The question was whether the bulk conforms to the sample. If the sample was substandard, the bulk can also be so. The fact that the bulk did not conform to the sample was mentioned only in Exts. A-11 and 12 dated 30th August 1980 and 3rd September 1980. Even then, the details were not mentioned. An application for the issue of a commission was filed only late in 1983 and Ext. C-1 is the report. The report and evidence of D.W. 3 Commissioner show that the bulk shown by the Appellant in its premises in carboys does not conform to the sample shown. But the, Commissioner is of opinion that the presence of adulterant cannot be found even by an expert and hence that work was not undertaken. The expert, who tested the bulk on 23rd August 1980 and the sample in June 1980, was not examined and no record is produced to that effect. There is no knowing whether the sample and bulk tested by the Appellant''s expert and D.W. 3 were those received from the Respondent or whether they were tested in the same condition in which they were received. The contention of the Appellant that it was the personal and business relationship which prevented the real facts from being disclosed in Exts. A-7 and 9 appears to be far from convincing. In the above circumstances, it is difficult to accept the version of the Appellant based on the two test results.

7. It is true that breach of description is a breach of condition entitling repudiation and it is not only a breach of warranty, as held in Govindji Jevat and Co. and Ors. v. Cannanore Spinning and Weaving Mills Limited, 1968 K.L.J. 635. The general principle of implied condition is clear and founded on the consensual basis of the law of contract. If the description of goods tendered is different from that of the goods agreed to be sold, it is not the article bargained for and the buyer is not

bound to take it. Antony Thomas v. Ayuppunni Mani, 1959 KLT 1271. But none of these questions may arise in this case, in view of the above facts. Sample was taken from the same barrel. The bulk was also taken delivery from the same barrel without verifying even though there was opportunity for that purpose. That means, the Appellant waived its right. Now there is no knowing about the identity of the bulk and sample tested by the Appellant and the Commissioner. Contention that the bulk does not conform to the sample cannot be accepted. The bulk is retained by the Appellant and it was not returned after taking delivery. It was not even accounted for or produced in Court. The Appellant is, therefore, liable for the claim and the appeal without merits.

The appeal is, therefore, dismissed, in the circumstances, without costs.