(1969) 04 MP CK 0002

Madhya Pradesh High Court

Case No: C.R. No. 302 of 1968

M/s Thakurdas Bhudarsao		APPELLANT
	Vs	
Industrial Stores Company and others		RESPONDENT

Date of Decision: April 25, 1969

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115
- Contract Act, 1872 - Section 28

Citation: (1972) JLJ 4 : (1971) MPLJ 1052

Hon'ble Judges: K.L. Pandey, J

Bench: Single Bench

Advocate: B.L. Seth, for the Appellant; M.M. Sapre, for the Respondent

Final Decision: Dismissed

Judgement

K.L. Pandey, J.

This application u/s 115 of the Code of CPC is directed against an order dated 12th January 1968 whereby the lower appeal Court affirmed an order of the Court of first instance directing return of the plaint to the applicant for presentation to the proper Court in Bombay on the ground that, by the contract Ex. P-1 dated 21st January 1955 made in Bombay, the parties had specifically agreed that all suits arising out of the contract would be instituted in a Bombay Court and in no other Court.

Having heared the counsel, I have formed the opinion that this application must be dismissed. Both the Courts below found upon evidence that a partner of the applicant firm, who made the contract, subscribed to the terms relating to institution of suits arising out of the contract only in a Bombay Court. That conclusion of fact must be accepted in this revision.

The applicant''s counsel, however, argued that the suit in this case was laid in tort (ex delicto) and not on the basis of breach of the contract Ex. P-1 dated 21st January 1955 and, therefore, it was not covered by the contract relating to jurisdiction of the Bombay Court permitted u/s 28 of the Contract Act. I agree that where there is an alternative cause of action in tort, the Plaintiff is not obliged to sue on the basis of the contract and, if he brings a suit in tort, a term of contract like the one in this case would not compel him to restrict his action to the forum agreed upon between the parties. The question, however, is whether the action in this case is one laid in tort.

The contract in this case related to the supply of a new generating set for light and illumination. The material averments are:

The Plaintiff submits that the Plaintiff contracted with the Defendant to purchase a new brand generating set but the Defendant played fraud on the Plaintiff by despatching old, used-up and welded machine to the Plaintiff and thus committed a breach of contract and as such the Defendant is liable to refund the amounts already paid by the Plaintiff to the Defendant amounting to Rs. 2,554/- and also Rs. 1100/- price of the old generating set sold to Defendant and interest on Rs. 3,654/- at Rs. 1% per month from 20-2-1955 until the date of realization. The generating set which was sent by the Defendant to the Plaintiff was useless. According to the terms of contract, the Defendant was to sell a new generator to the Plaintiff. Since the Defendant committed a breach of contract and failed to send a new generator, the Plaintiff had to hire two small generating sets from National Loud Speakers and Lighting Service, Wara-Seoni, from 15-4-1955 to 14-5-1955 for marriage and preparations necessary for the same, at Rs. 20/- per day and thus paid Rs. 600 /- to the National Loud Speakers Service, Waraseoni. Due to the breach of contract committed by the Defendant, the Plaintiff was required to spend the above amount of Rs. 600/-. And as such, the Plaintiff is entitled to claim this amount of Rs. 600/- also from the Defendant.....
That the cause of action arose on 20-2-1955 at mouza Balaghat, Tahsil and District Balaghat, within the jurisdiction of this Court, when the Defendant committed breach of contract by delivering old and welded generator instead of a new one.

The only averment to which reference has been made as indicating that the action should be regarded as laid in tort is that the Defendant firm played fraud by supplying the old machine instead of a new one as agreed upon between the parties. It is plain enough that this, without more, would amount to no more than a breach of contract and the applicant said that the Defendant firm had committed a breach of the contract (paragraph 3 of the plaint.) Indeed, in paragraph 5, it is expressly stated that the cause of action arose on 20th February 1955 (and not on 21st January 1955) when the Defendant firm committed a breach of contract by delivering an old machine instead of a new one.

The cases relied upon by the applicant''s counsel are of no assistance in this case. K.C. Dhar Vs. Ahmad Bux, , Sukul Bros. v. H. K. Kavarana AIR 1958 Cal. 730 and Messrs. Ponatmal Laxmichand v. Bharat Transport Co.CR C.R No 370 of 1966 decided on the 18th Nov.1966 deal with the obligation of a common carrier independently of any contract. Similarly, in Jackson v. Mayfair Window Cleaning Co. Ltd.4, the cause of action was not a breach of the contract but a failure to take reasonable care independently of contract.

Relying upon observations made by Pollock on Torts (14th Edition, page 431) and Winfield on the law of Torts (6th Edition, page 702), S. Ramaswamy Iyer observed in his Law of Torts as follows:

It is not always easy to say whether the cause of action is substantially the one rather than the other. The test suggested is to see whether there would be an actionable injury even if there were no contract. If there is, it is a case of tort; otherwise it is contract. A good practical test is said to be whether, if the claim on the contract were struck out of the pleading, any ground of action would remain. If it would, it is not a case of contract: else it is. (5th Edition, Page 703.)

Applying these tests, it is obvious that the action in this case is not laid in tort but is one grounded on a breach of contract.

For the reasons aforesaid, this revision fails and is dismissed. Costs shall follow that event. Hearing fee Rs. 50/.