(1989) 06 MP CK 0007

Madhya Pradesh High Court (Gwalior Bench)

Case No: F.A. No. 84 of 1978

Kaluram Bhagwati Prasad (Firm)		APPELLANT
	Vs	
Balramdas Laxmi Narain (Firm)		RESPONDENT

Date of Decision: June 30, 1989

Acts Referred:

- Sales of Goods Act, 1930 - Section 17(2), 54(2), 56, 60

Citation: (1989) MPJR 775 : (1991) 36 MPLJ 575 : (1991) MPLJ 575

Hon'ble Judges: T.N. Singh, J

Bench: Single Bench

Advocate: Swami Sharan, for the Appellant;

Final Decision: Dismissed

Judgement

J.N. Singh, J.

This is plaintiffs appeal whose suit apparently based on Section 56 of the Sale of Goods Act, 1930, for short, the "Act", has been dismissed.

With regard to the facts of the case which lie within a short compass, admitted fact is that the plaintiff and defendant were food grain merchants and there was a contract between them relating to sale of toor dal. The nature of the contract and conditions thereof being disputed, a few words have to be stated in regard to that controversy at the outset.

At para 2 of the plaint, the genesis of the contract and its nature are not mentioned on which the trial Court has commented adversely against him though on that ground the suit was not dismissed. The only statement in para 2 of the plaint is that in July, 1973, defendant firm had contracted with the plaintiff firm to purchase 240 bags of toor dal at the rate of Rs. 230/- per bag F.O.R. Sabalgarh Station (Bilticut, tax-paid). Pursuant thereto the consignment was despatched under four railway receipts each covering 60 bags and the goods were despathed to Bhatapara Railway

Station from Sabalgarh. Nothing else is mentioned in para 2.

The further case of the plaintiff was that on 23-7-1973, by telegram the defendant was informed of despatch of the goods, but the Bank (State Bank of India) informed the plaintiff on 7-8-1973 that the relevant Hundi for the goods despatched was dishonoured by the defendant. As the result of defendant''s illegal action, the plaintiff had to depute a representative to Bhatapara on 23-8-1973 to contact the defendant and on 3-9-1973 again, a telegram was sent to the defendant that for all loss or non-acceptance of goods he will be held liable. The plaintiffs claim was for a decree in the sum of Rs. 13,334/- for loss occurred due to resale of the goods as price of toor dal had fallen in the market.

In his written statement, the defendant gave genesis and particulars of the contract and his version has been accepted by the trial Court on valid ground to which I advert in immediately. The trial Court has rightly attached signal importance to defendant''s letter written to the plaintiff as early as on 17-9-1973, proved in suit as Ex.D/1. Indeed, that letter is defendant''s legal notice to plaintiff alleging breach of contract. In para 1 of that letter, it was mentioned that the defendant had contracted to purchase from the plaintiff "one wagon load (240 bags) number one quality of Toor (Rahar) Dall Tax-paid, bulty-cut, rate Rs. 230/- per quintal new gunny bags". In that notice, it was alleged that the contract was breached by the plaintiff because the goods supplied was "very inferior (number three quality)" and that at the time of contract, sample was shown of "number one quality". That apart, as per contract, the entire consignment of 240 bags had to be booked in one railway receipt in one wagon, but that was not done. In that notice, the defendant stated that the contract was made through a broker and a representative of that broker with representative of the plaintiff had come to Bhatapara and taken sample of the goods lying at Bhatapara Station. In the presence of some persons, namely, one Saligram Daga and others, the samples were compared and partners of defendant firm, Ramnarayan and Laxminarayan informed the two representatives that even at reduced rates, they were not in a position to accept the goods though, those two representatatives consented to reduce the price by Rs. 3,000/-. In the written statement, the same case was set up and reiterated.
The Court below struck as many as ten issues, but I have no doubt that the instant appeal can be disposed of having regard only to the controversy agitated in issue No. 4 decided in defendant''s favour. The issue was, "whether inferior quality dall had been despatched".

In this connetion, reference may be appropriately made at this stage to the provisions of Section 17 of the Act which I quote :

"17. Sale by sample. - (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample there is an implied condition -

(a) that the bulk shall correspond with the sample in quality.

(b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;"

In this appeal, much is sought to be made out by appellant''s counsel Shri Swami Saran of the fact that it was the duty of the defendant to produce in Court the sample on which he had built up his case and on his failure to do so, his plea founded on Section 17 must be rejected. In that contention, I see little merit because of what I read in the evidence which has also been accepted by the trial Court. There is preponderance of evidence in this case that the goods supplied did not "correspond with the sample in quality" and if that position is accepted, then the plaintiff''s case must fail, because of what is contemplated in Section 17(2)(a).

Let it be noted further that Section 31 vests on the buyer the duly, "to accept and pay for (the goods) in accordance -with the terms of the contract of sale". Buyer''s right of examining goods at the time of delivery is explicitly reserved u/s 41 which contemplates that the buyer shall not be deemed to have accepted the goods "unless and until he has had reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract". According to Section 43, buyer is not bound to return rejected goods unless there is contract to the contrary and the only duty thereunder on the buyer is. that he has to intimate to the seller that he refuses to accept the goods. However, Section 54(2) may be profitably extracted in extenso along with Sections 56 and 60 :

"54. Sale not generally rescinded by lien or stoppage in transit. -

(1) XXX XXX

(2) Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the un-paid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract but the buyer shall not be entitled to any profit which may occur on the resale. If such notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale."

"56. Damages for non-acceptance. - Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance."

"60. Repudiation of contract before due date. - Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach."

Let now the relevant evidence be discussed. Before filing the suit, as per Ex. P/25, lawyer''s notice was served on the defendant and that notice is dated 27-2-1974. Let it be recalled that long before that, the defendant had his notice served through his lawyer on 17-9-1973 on the plaintiff. It is surprising that in spite of the specific case being set up by the defendant in his notice about the quality of the goods and about other breach of the contract in the matter of despatch of the consignment in instalments nothing about that was said in plaintiff''s notice. Indeed, nothing was said even about comparing" of sample alleged by the defendant in his notice. On the other hand, that fact has been proved by defendant by adducing evidence of material witnesses. They are D.W.I Shaligram Daga and partners of the defendant firm, Ramnarayan and Laxminarayan, examined as D.W.2 and D.W.3 respectively. They all supported the case of the defendant that inferior -quality of goods was supplied and that bulk was matched with the sample.

On referring to the evidence of Laxinarayan (D.W.3), I am satisfied that the contention raised by Shri Swami Saran is baseless. He has explained why the sample could not be produced in Court and indeed, the plaintiff neither accepted defemdant''s case of contract made on the bais of sample nor did he press the defendant for production of sample in Court. D.W.3 deposed that the sample was misplaced because the sample was shown to different persons for matching with the bulk supplied.

In support of his case, the plaintiff examined on commission P.W.I Ramkrishna Agrawal. He proved only the fact that on refusal by the defendant to accept the supply, the goods were sold to him. P.W.2 is Rampal who was a broker working in firm Rampal Mahiti and Co. He admitted in his evidence that at the instance of the plaintiff, one representative of the broker firm Rampal Mahiti went to meet the defendant, but asserted that no sample was shown to that representative and none was matched with the bulk supplied. The only other witness is none else than Bhagwati Prasad who was a partner of the plaintiff firm. Evidently, the plaintiff took no care at all to examine any representative of broker''s firm even after admitting the fact that representative of that firm, as alleged by the defendant, had gone and met the defendant at the instance of the plaintiff to persuade the defendant to accept the goods. That is very clear from the evidence of P.W.2 Rampal that it was not he, but another man who had gone to Bhatapara in that connection. In evidence of the defendant it is disclosed that one Harsibhai was the representative of the broker firm Rampal Mahiti. It is also surprising that the plaintiff did not examine his own representative Devi Prasad who had gone to Bhatapara to meet the defendant on defendant having refused to accept goods despatched by the plaintiff. For that default, the plaintiff must suffer seriously because the burden was on the plaintiff to prove his own case.

Before adverting to the other provisions of the Act, extracted or referred hereinabove, a brief mention may be made of Section 5 of the Act as that has

definitely signal relevance to plaintiffs default in pleading and proving his case. It is contemplated thereunder that a contract for sale of goods may be made in writing or by word of mouth, partly in writing and partly by word of mouth and, as pointed out at the outset, in the plaint, no care was taken to give the origin and formation of the contract in any manner. Indeed what was the offer made and how it was made or in what terms it was accepted are also not to be read in the plaint. For enforcing the contract, it was the bounden duty of the plaintiff to mention all those particulars in the plaint to prove the case, pleaded in the plaint. In this context, let it be recalled that while the plaintiff sought to justify delivery of goods contracted for in instalments (through four different railway receipts), the defendant''s case was that delivery was to be made of the goods despatched in a single wagon as that would have cost less to the defendant. In Ex.D/1, plaintiff''s breach in that regard was complained, but that remained unexplained.

There cannot be any doubt that u/s 56, claim for damages for non-acceptance would lie only when the buyer acts "wrongfully" in refusing to accept goods contracted to be purchased. In the instant case, the act of the defendant cannot be said to be "wrongful" because he had merely exercised his statutory rights contemplated u/s 17(2)(a).There is also nothing on record to afford to the plaintiff protection of Section 54(2) as the plaintiff did not exercise his right to resell thereunder. On evidence, it is established that the plaintiff took recourse to re-sell accepting the position that the goods supplied were of inferior quality and on that account reducing the price payable therefore by the defendant. The right to re-sell contemplated u/s 54(2) would arise in a case in which the seller can have no complaint against the buyer in terms of Section 17(2) of the Act. The moment it is established that the "implied condition" contemplated u/s 17(2) is breached by the seller, the contract shall become enforceable and right to re-sell contemplated u/s 54(2) cannot be enforced by him against the buyer.

However, according to me, plaintiff''s claim founded on Section 56 is refuted also by Section 60. Admittedly, in this case, the goods had not been delivered to the defendant. The goods despatched by the plaintiff were lying at the Railway Station and delivery could not be taken by the defendant without honouring the Hundi and taking from the Bank the Railway Receipt to obtain delivery from the railways of the gods despatched. Section 2(2) defines the term "delivery" to mean "voluntary transfer of possession from one person to another". In this case, transfer of possession of the goods despatched had not taken place in favour of the defendant. In the instant case, as discussed above, the defendant had repudiated the contract and had himself served the notice through his lawyer on the plaintiff for breach of the contract. Section 60 is already extracted above. The word "repudiate" used in the said provision signifies "duty or obligation owed to other party" (see Black''s Law Dictionary, Fifth Edition, page 1171). Black also gives another meaning of the term - "the act of a buyer or seller in rejecting the contract of sale either partially or totally". For the word "rescind", which occurs in the above extract, meaning is also

given in Black at page 1174. It means -(1) to declare a contract void in its inception and to put an end to it as though it never were; (2) Not merely to terminate it and release parties from further obligations to each other but to abrogate it from the beginning and restore parties to relative positions which they would have occupied had no contract ever been made. In the instant case, on evidence, the plaintiff must be deemed to have treated the contract sued upon to be "rescinded". Indeed, his claim for "damages for the breach" contemplated u/s 60, must fail because the defendant is found not to have breached the contract. I have no doubt that Section 60 has to be read subject to the provisions of Section 56 and in the instant case it has been found that the defendant had not acted "wrongfully" to refuse to accept delivery so as to render him liable for damages u/s 56.

For all the forgoing reasons, the appeal fails and is dismissed. The decision of the Court below dismissing the suit is upheld. However, there is no order as to costs in this appeal as defendant/respondent has not appeared in this Court.