Shrichand Anopchand Gujar Vahiwatdar and Others Vs P.E. Boyce and Sons and Another

Court: Bombay High Court

Date of Decision: Feb. 7, 1923

Citation: AIR 1924 Bom 62 : 80 Ind. Cas. 720

Hon'ble Judges: Norman Macleod, C.J; Crump, J

Bench: Division Bench

Judgement

1. On the 7th August 1917 the plaintiff entered into a contract with the 1st defendant to buy 2,000 bags of cotton seeds to be delivered at the

defendant''s factory within one month, The plaintiff agreed to, pay the full amount in respect of the said bags which appear to have been sold at the

rate of 41 lbs, to the rupee, and remove the goods within the said time; and if he failed to remove the same within the same period, he undertook to

make good the loss which the defendant might suffer, and treat the contract as cancelled. We confess it is difficult to extract the meaning of the

words which caused the dispute in the present suit. ""In respect of this contract a total sum of Rs. 1,025 has been deposited for profit or loss, and

the said deposit amount should, after the completion of the contract, be returned to us.""

2. The plaintiff did not take delivery within one month. On the 24th September 1917 he received a notice from the 1st defendant as follows: ""You

should within eight days after receipt of this notice, come and pay the moneys that may be found due to us under accounts and take away the

goods. If you should fail to do so, the said goods will be sold at your risk at the market; rate and as regards damages, you will be held responsible

for the balance that may remain after deduction of your advance amount, and you will be required to pay interest on the amount from the date of

the expiry of the period of your agreement.

3. The period for performance was extended to the 2nd October. That is the date on which the contract was finally broken by the plaintiff. The

defendant did not sue for damages but claimed to retain Rs. 1,025.

4. In April 1919 the plaintiff filed this suit to recover Rs. 1,025 on the ground that defendant No. 1 had broken the contract. The plaintiff originally

claimed damages to the extent of Rs. 2,175 in addition to the deposit of Rs. 1,025, but when asked to furnish particulars he failed, when the claim

was reduced to Rs. 1,025, the amount of the deposit.

5. The suit was dismissed in both the Courts. It is contended by the 1st defendant that the parties agreed that Rs. 1,025 were security for the

performance of the contract, and because of non-performance by the plaintiff the amount should be forfeited. That is not what the contract says,

and that is not what the 1st defendant thought the contract meant when he wrote the letter of the 24th September 1917; and since it is dear that

defendant No. 1 could only succeed by reading into the contract words which are not there, we see no reason why we should now accede to that

request on behalf of the 1st defendant when at the time the plaintiff was in default in the performance of his part of the contract, he did not consider

that Rs. 1,025 was security for the non-performance of the contract.

6. That would be sufficient to dispose of the defendant''s contention. A part from the letter of the 24th September, it seems to us to be a rational

construction to be put upon the words ""In respect of this contract a sum of Rs. 1,025 is deposited for profit or loss"", that Rs. 1,025 was to be

security for any loss that defendant No. 1 might suffer on the plaintiff''s failing to take delivery of the goods.

7. Unfortunately the question of. damages was not sufficiently considered by the Court below. The question was mixed up with a further question

whether as a matter of fact the 1st defendant had suffered any loss at all, and the question, what was the proper measure of damages, does not

seem to have been considered in any way in either Court. It does not appear from the wording of the contract that this was a contract for

ascertained goods and the statement in the letter of 24th that ""the goods belonging to the plaintiff were lying with the defendant and that the plaintiff

had not removed them"" would not be sufficient, considering the terms of the contract, to show that the goods had been ascertained and set apart

for the plaintiff''s use. Considering the contract was for the purchase of 2,000 hags of cotton seeds, we think the 1st defendant merely meant that

he had got 2,000 bags ready for delivery to the plaintiff when he chose to come and take them.

8. It will be necessary, therefore, to remand the case to the trial Court under Order XLI, Rule 25 for the Trial of an issue: What was the loss

suffered by the 1st defendant owing to the failure of the plaintiff to take delivery? The measure of damages would be the difference between the

contract rate and the market rate of the contract goods on the 2nd of October 1917.

9. Finding to be certified by the Appellate Court in 3 months. Parties to be allowed to adduce fresh evidence. If parties come to an agreement on

our findings, it will save a great deal of trouble. All costs to be costs in the cause.